The Rule of Law and Hong Kong Legal System

法治與香港法制 GEC1021 (2019)

Lecture Topics and Sequence:

Before we start to know about Law, let us see if law can actually solve any dispute by looking at how can a court judge could do in this case.

A law teacher (famous sophist Protagoras: 普羅泰戈拉 B.C 481-411) took on a pupil Euathlus 伊那塞拉斯. Protagoras was to demand very high fees because of his excellent reputation.

Euathlus could not pay any fees because he had no money. They made an agreement that as soon as **Euathlus won his first case he would begin paying.** Because Protagoras was so good and famous, Euathlus was bound to start winning cases and both would be happy.

Euathlus proved a very good learner and left Protagoras well versed in law. But then he decided not to practise and never took on a single case. So the teacher never got any money.

Protagoras therefore sued Euathlus for his fees:

Protagoras put forward his argument saying: "If I win this case, as per the court of law, Euathlus has to pay me as the case is about his non-payment of dues. And if I lose the case, Euathlus will still pay me because he would have won his first case... **So either way I will get the money**".

Equally brilliant, Euathlus argued back saying: "If I win the case, as per the court of law, I don't have to pay anything to Protagoras as the case is about my non-payment of dues. And if I lose the case, I don't have to pay him because I haven't won my first case yet .... **So either way, I am not going to pay the teacher anything**".

Will the teacher get his fee?

@ Classification of law

1. Written vs. Unwritten (成文法 vs. 不成文法)

2. Civil vs. Common law (大陸法系 vs.普通法系)

3. Civil vs. Criminal law (民事 vs.刑事)

(a) Civil law: It refers to a civil wrong or a breach of civil obligation. This includes contract law, tort law, family law, law of trust, company law, law of agency, law of partnership... and basically all other branches of business law or commercial law are part of civil law (the list is endless). Constitutional law and administrative law may also be regarded as part of civil law. Civil law regulates the relationship between individuals. It is the individual's duty to bring an action in civil law if he thinks that his rights have been infringed upon. The government has no business in that, saved as to provide legal aid where applicable. The plaintiff must establish his claims against the defendant on the "balance of probabilities." The remedy that the plaintiff may expect if he wins the case is normally damages, i.e. compensation in terms of money), or sometimes injunction, specific performance, or otherwise. But the defendant will never end up in jail even if he loses the case.
(b) Criminal law: A wrong against the state (society). This includes homicide, assault, theft, fraud, rape, etc. While the aim of civil law is to compensate the plaintiff, the target of criminal law is mainly to punish and reform the convicted criminals, and even to disable them temporarily from presenting a danger to the society. Since they are thought to have caused a harm to the society as a whole, the Department of Justice will be responsible for prosecuting the accused, although an individual may in theory also be able to initiate a criminal action.(S.14 of the *Magistrates Ordinance*. In a criminal action, it is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt.

4. Enacted vs. Decisional vs. Customary (議會立法 vs.法庭決定 vs.地方習慣)

5. Municipal (domestic) vs. International (國內法 vs.國際法)

6. Constitutional vs. Public vs. Private (憲法 vs.公法 vs.私法)

7. Substantive vs. Procedural (實体法 vs.程序法)

8. Common Law vs. Statute Law (案例法 v 議會立法)

9. Common Law vs. Equity (see p.14) (普通法 v 衡平法)

10. Delegated Legislations Under a Statute (授權立法)

e.g. Rules 規則, orders by-laws

* The three Institutions of Law and Separation of powers 三權分立

- Legislature
- Executive
- Judiciary

@ The Legal System in Hong Kong (1)

* The Court system in Hong Kong

- Magistrate Court 裁判法院

- District Court / County Court 區域法院

- Court of First Instance (High Court) 高院原訟庭

(Divisions in UK : Chancery, Family, Queen's Bench)

- Court of Appeal (High Court) 高院上訴庭

- Final Court of Appeal (Privy Council, House of Lords) 終審庭

- Tribunals: Specialized Courts, e.g.

- Labour 勞資審裁處

- Lands 士地審裁處

- Small Claim 小額錢債審裁處

- Insider Dealing 內幕交易審裁處

- Coroners 死因裁判庭

Courts in Hong Kong

Court of Final Appeal

Composition: bench of 5 judges. It hears appeals in criminal and civil matters from Court of Appeal.

It takes over the former role of the Judicial Committee of the Privy Council in UK as the court of final appeal for Hong Kong. No appeals against the decisions of the CFA are available. As an appellate court, it will only hear appeals. When they sit to hear a case, they will invite an additional judge selected from a list of Non- permanent Judges consisting of senior judges of other common law jurisdictions and local retired judges to join them.

An appeal shall lie to the Court of Final Appeal in any civil cause or matter:

(a) as a right, from any final judgment of the Court of Appeal, where the matter in dispute in the appeal amounts to or is of the value of $1,000,000 or more. (Repealed) In all other cases, appeals to the CFA would only be allowed if the Court of Appeal or the CFA granted leave on the ground that the appeal involved a question which, by reason of its great general or public importance, or otherwise, ought to be submitted to the CFA for decision. Following the repeal of section 22(1)(a), all civil appeals to the CFA are now subject to discretionary leave from either the Court of Appeal or the CFA, regardless of the amount involved. This change applies to Court of Appeal final judgments (whether pronounced orally or delivered in writing) on or after 24 December 2014.

(b) at the discretion of the Court of Appeal or the Court of Final Appeal, from any other judgment of the Court of Appeal, whether final or interlocutory, if, in the opinion of the Court of Appeal or the Court of Final Appeal, as the case may be, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision.(Most other common law jurisdictions, including England and Wales, Australia and New Zealand, require that leave be obtained before appeals can be made to their highest appellate courts.)

Court of Appeal

Hears both criminal and civil appeals form the Court of First Instance and the District Court, normally three judges, also considers applications from Attorney General for review of sentence and references by AG on questions of law under the Criminal Procedure Ordinance. When it sits to hear a case, there will be three Justices of Appeal presiding. It is also an appellate court and only hears appeals

Court of First Instance (previously, "the High Court")

Single judge in civil matters; criminal, with jury of seven or in special case nine jury verdict of at least 5 to 2, except in charge attracting the death penalty tries all serious offences, e.g. murder, rape. The CFI is in fact the only court in Hong Kong that may use a jury If a case has been initiated in the CFI, appeal may be available firstly to the CA, and secondly to the CFA. The CFI also functions as an appellate court and hears appeals from Magistrates Courts, Labour Tribunals and Small Claims Tribunal exercises original, appellate and supervisory jurisdiction

District Court

Inferior courts, single judge, sitting alone

CRIMINAL, JURISDICTION: serious criminal offences, with exception of murder, manslaughter and rape. The maximum term of imprisonment it can impose is seven years. It also exercises limited appellate jurisdiction in hearing appeals from tribunals and statutory bodies conferred on it under various ordinances, including the Stamp Duty Ordinance (Cap 117), the Pneumoconiosis (Compensation) Ordinance (Cap 360) and the Occupational Deafness (Compensation) Ordinance (Cap 469).

CIVIL JURISDICTION in DC and SCT:

The commencement notices to give effect to the two resolutions relating to the civil jurisdictional limits of the District Court (DC) and the Small Claims Tribunal (SCT) passed by the Legislative Council on June 27, 2018 were published in the Gazette today (July 6).

The two resolutions seek to increase the civil jurisdictional limits of the DC and the SCT stipulated respectively in the District Court Ordinance (Cap 336) and the

Small Claims Tribunal Ordinance (Cap 338) as follows:

(a) increasing the general financial limit of the civil jurisdiction of the DC from $1 million to $3 million;

(b) increasing the financial limit for land matters of the DC from $240,000 to $320,000 in terms of the annual rent or the ratable value or the annual value of the land;

(c) increasing the limit for the equity jurisdiction of the DC where the proceedings do not involve or relate to land from $1 million to $3 million;

(d) increasing the limit for the equity jurisdiction of the DC where the proceedings wholly involve or relate to land from $3 million to $7 million; and

(e) increasing the limit for the SCT from $50,000 to $75,000.

The Chief Justice of the Court of Final Appeal has appointed December 3, 2018 as the commencement date of the above jurisdictional rise.

Magistrates Courts

These are criminal courts permanent magistrates and special magistrates permanent magistrates are Cantonese speaking, conduct cases in that language; petty offences, e.g. theft, loitering 閑逛, possession of drugs, criminal damage, common assault, road traffic offences, maximum sentence 2 years imprisonment, or 3 years for 2 or more offences where sentences to run consecutively 連續地 also preliminary hearing (committal proceedings) also sit: in the Juvenile Court also as coroners special magistrates (no formal legal qualifications), hear routine offences like littering 亂丟垃圾 and minor road traffic offences .

Magistrates exercise a criminal jurisdiction, which covers a wide range of indictable and summary offences. Their powers of punishment are generally restricted to a maximum of two years' imprisonment, or a fine of $100,000, but in respect of certain offences their powers are greater.

All indictable offences originate before a magistrate. The Secretary for Justice may apply to have a case transferred to the District Court or committed to the Court of First Instance depending on the seriousness of the case. Appeals are brought from a magistrate to a judge of the Court of First Instance.

Special magistrates may be qualified lawyers or persons with substantial experience in the legal field. They deal with cases of a more routine nature, such as hawking and minor traffic cases. In general, since 2017 年 4 月 18 日 - The normal maximum sentence is 2 years' imprisonment and a fine of $100,000. Maximum fine is $50,000 except where a greater sum is specifically provided.

Small Claims Tribunal

Inferior court, quick, informal, inexpensive, legal representation not allowed jurisdiction in respect of disputes over contracts and monetary claims in contract or tort. Its jurisdiction has recently been expanded. Now it can hear claims for damages in contract and tort where the amount claimed is less than $75,000. If a claim is within the jurisdiction of the Tribunal, it cannot be brought in any other courts. A plaintiff can abandon part of his claim in order to give the Tribunal jurisdiction. The Presiding Officer may decide to transfer a complicated case to the jurisdiction of either the DC or the CFI. The Small Claims Tribunal Ordinance stipulates that the hearing of Tribunal should be in an informal manner and solicitors or barristers cannot represent the parties. A Presiding Officer hears and decides the case. After the Tribunal makes a decision, it may reopen the case if one of the parties want to appeal against the decision. It may also admit new evidence when it reopens a case If a case has been initiated in the Small Claims Tribunal, appeal may be available firstly to the CFI, and secondly to the CA

Minor Employment Small Claims Adjudication Board

Inferior court, quick, informal, inexpensive, legal representation not allowed jurisdiction in respect of claim by not more than 5 claimants for a sum of money not exceeding HK$8,000 per claimant arising out of a breach of a term of a contract of employment/apprenticeship or non compliance with provisions Employment Ordinance, questions over severance payment.

Labour Tribunal

Inferior court, quick, informal, inexpensive, legal representation not allowed jurisdiction in respect of disputes over employment contracts. Note: if dispute is over an employment contract, no other court in Hong Kong has jurisdiction regardless of the quantum involved. It will however not hear claims that have been delayed for more than 12 months. The Presiding Officer may decide to transfer a complicated case to the jurisdiction of either the DC or the CFI.

When a claim is filed with the Tribunal, a Tribunal Officer will first make inquires and prepare a summary of facts for the consideration of the Presiding Office who will hear and decide the case. The Tribunal Officer will also attempt conciliation between the parties. The Tribunal will hear a case only when efforts of conciliation have failed. During the hearing, the Presiding Officer still has power to adjourn the hearing for conciliation. He may also involve the Commissioner for Labour in the conciliation process The Labour Tribunal Ordinance stipulates that the Tribunal will conduct public hearing in an informal manner. Solicitors or barristers cannot represent the parties. The normal rules of evidence do not apply. And the Tribunal can reopen a case after it has been decided.

The Lands Tribunal

It is mainly concerned about legal actions between landlords and tenants, and established to provide specialist expertise in matters relating to rating and valuation and assessment of compensation upon government acquisition of land President (High Court Judge) and presiding officers (District Court Judges); other members appointed by the HKSAR Chief Executive; proceedings heard by a District Judge nominated by the President; practice and procedure as in the Court of First Instance.

It is the most formal administrative tribunal. The Presiding Officer may decide to transfer a complicated case to the jurisdiction of either the DC or the CFI. The Tribunal may review its decision within one month it has been made The Tribunal is the most formal administrative tribunal and the parties can be represented by barristers or solicitors

Sources of Hong Kong Law

1. Common Law
As the administration of common law and equity merge, the term "common law" comes to mean both the common law in the traditional sense and equity. Similarly, law merchant, which was originally the international law administered by courts set up by European inter-national traders, was absorbed into the common law leg, the laws of bills of exchange and of the sale of goods). Therefore, nowadays when people refer to common law, they often simply mean case law, including both rules of common law and equity, as distinguished from legislation.

2. Equity (see above)

3. Statutes 法例(議會立法例)

Statute law is that set of laws enacted by the legislature. It can be Ordinance or in the form of delegated legislation, ie, rules, regulation, schedules or tables.

4. Delegate Legislation (附屬立法)

5. Local Customs
Traditional Chinese law and custom apply principally in the areas of family law and land law. Prior to 1971, rules relating to matters such a marriage, divorce, and option and succession of property were in certain circumstances governed to some extent by Chinese law and custom. However, as a result of legislative amendments in 1971, the validity of these matters fell to be determined largely by statutory law.
Before HK was ceded to Britain in the mid-l9" Century: Qing Code and local customary law The colonial government to an extent recognized the validity of Chinese customary law in relation to areas like marriage, divorce, and inheritance, especially with reference to the New Territories.

6. EEC Law (UK only)

7. Canon Law 教會法律

At early days the church courts were very important. The law enforced in the church courts was cannon law which was influenced by the Roman Law. The matters dealt with included :

1. clergy 聖職者 discipline

2. marriage, eg declaring whether a lawful marriage had in fact taken place; judicial separation 分居 and divorce 離婚

3. legitimacy 適法

4. wills of personal property

8. Law Merchant (Mercantile law 商法)

` Neither more nor less than the usages of merchants and trader.... ratified by the decisions of the Courts of law which, upon such usages being proved before them, have adopted them as settled law ' Goodwin v Roberts 1875

9. Basic Law :
Basic Law is the constitutional document the Hong Kong Special Administrative Region. It comes under Article 31 of the Chinese Constitution of 1982. It is a law enacted by the National People's Congress. The Basic law sets out the relationship between Hong Kong and the Mainland, the political framework for Hong Kong, and defines some of the powers of the Hong Kong Government.

By its terms, the Basic Law applies only up to 2047. After that date, Hong Kong will cease to have the special privileges accorded to it under the Basic Law. Unless new provisions are made for it, Hong Kong will thereafter be treated as an ordinary province of China.

Article 8

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Article 18

The Laws of the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as stipulated in Article 8 of this Law, and the

laws enacted by the legislature of the Hong Kong Special Administrative Region.

10. Joint Declaration of The Government of the United Kingdom of Great Britain and Northern Ireland and The Government of the People's Republic of China on the Question of Hong Kong (1984)

Article 3

The Government of the People's Republic of China declares that the basic policies of the People's Republic of China regarding Hong Kong are as follows :
(3) The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged.

11. Letters Patent 英皇制誥, Royal Instructions 皇室訓令, (Historical now, but practices and precedents are persuasive) Standing Orders 議事程序

12. The Bill of Rights Ordinance
This Ordinance brings in human rights authorities in other jurisdictions.

13. PRC national laws relevant to Hong Kong
i. Resolution on the Capital, Calendar, National Anthem and National Flag of the People's Republic of China
ii. Resolution on the National Day of the PRC.
iii. Order on the National Emblem of the PRC proclaimed by the Central People's Government
iv. Declaration of the government of the PRC on Territorial Sea
v. Nationality Law of the PRC
vi. Regulations of the PRC concerning Diplomatic Privileges and Immunities

In summary, laws in Hong Kong SAR include:

1. Common Law and Equity (Art.8)
2. The Basic Law
3. New laws enacted by the SAR
4. Laws enacted by the National People's Congress or its Standing Committee which relate to defense and foreign affairs and otherwise as stated in Article 18.

#Law of Equity [supplement]

In a general sense equity means fairness. In English law, equity means a body of rules originally enforced only by the Chancery. Equity has been described as a supplement on the common law, filling in the gaps and making the English legal system more complete. The law of equity developed as a response to the rigidity of common law in the past. It is originally administered by the Lord Chancellor according to his sense of justice and fairness. Later it became regularized and developed into its own case law and a body of rules and principles. Eventually, equity and common law became administered by the same system of court in the late 19" Century. Whenever there is a conflict between the rules in equity and that in common law, equity will prevail and relieve the innocent party in the litigation from the rigidity of the common law

` Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law.... equity therefore does not destroy the law, nor create it, but assist it ': Lord Cowper in Dudley v Dudley (1705)

History

It originated from those who petitioned to the King because they were unable to obtain justice in the common law courts were sent to the King as `fountain of justice'. These petitions were sometimes examined by the King and his Council and the relief was granted or refused. Later, due to pressure of business in the Council, the petition were sent to the Lord Chancellor to deal with the petitions.

Conflicts between the equity and common law courts continued until the Judicature Acts 1873-75 which set up a new structure of courts known as the Supreme Court of Judicature, two important principles:

1. Equity and common law should in future be administered side by side in all courts
2. Where there is a conflict between a rule of equity and a rule of common law with reference to the same matter, the rule of equity should prevail

* The result of the Acts was the fusion of administration of both common law and equity.

Common Law Remedies:

- Damages

Equitable Remedies :

- Injunction
- Specific Performance
- Rescission of Contract
- Rectification

* These remedies are at the discretion of the court unlike the common law remedy of damages which is `of right'. The discretion is exercised on equitable principles, known as:

Maxims of Equity:

1. Those who come to equity must come with clean hands: means equity does not provide a remedy to a person who has behaved unconscionably, eg. (beneficiary who has acquiesced in a breach of trust)
2. delay defeats equity
3. equity does not suffer a wrong to be without a remedy
4. Equity will not assist a volunteer
5. equity looks on that as done which ought to be done

e.g. estoppel, equitable lease

* Equity act in *personam* not in *rem*

* That is one reason why equity is at the discretion of the court.

Law Reports

Hong Kong Law Report (HKLR)

Hong Kong Case (HKC)

Unreported Cases of the Supreme Court of Hong Kong (Unrep.)

Hong Kong District Courts Law Report (DCLR)

Hong Kong Law Digest (HKLD)

Hong Kong Law Yearbook (HKLY)

Hong Kong Law Journal (HKLJ)

English Report (ER)

Appeal Cases (AC)

Chancery Division (Ch)

Queen's Bench (QB)

King's Bench (KB)

Weekly Law Reports (WLR)

All England Law Reports (ALL ER)

The System of Judicial Precedents (stare decisis: stand by the decision)

The doctrine of precedent is based on the maxim that equal cases should be treated equally. The doctrine requires the judges to be bound by the precedents laid down by the courts at a higher level in the same system of courts when they decide cases. The role of the judge is to search for an authority from previous cases or decide upon which competing previous decision is binding on him. If a precedent with the same material facts has been decided in a particular way, the latter judge must decide the present case in the same manner.

The ratio *decidendi* 判決理由: the principle of law which run through the case and on which the decision is based, it is binding authority.

The *obiter dicta* 附帶意見: not for decision in the case, but deliberate expression of opinion given after consideration of a point clearly put and argued before the court ---> something the judge said by the way

Binding 約束性, Precedents 判例 : must be followed by lower courts, only the ratio is binding.

Distinguishing a case and *Per Incuriam* (Carelessness)

A later judge may refuse to follow a previous decision by distinguishing it from the present case by interpreting the level of abstraction of the material facts that formed the basis of the previous ruling. In other words, the latter judge can say that the rule laid down in the previous decision is only applicable to its specific facts.

A latter judge may also refuse to follow a previous decision by applying the *per incuriam* rule, (through inadvertence; in ignorance of the relevant law) according to which there is no need to follow those decisions given in ignorance of some inconsistent statutory provision or of some authority binding on the court concerned. "When the essence of a pervious decision with which a judge disagrees cannot so easily be dismissed as obiter dictum, the judge may, as a desperate last resort, categorize the previous decision as p*er incuriam*; an acceptable legal euphemism for a judgment that was obviously wrong" David Pannick J.

Persuasive 有說服的 Precedents :

1. decision of lower courts

2. decision of courts in Scotland, Ireland, Canada, Newzerland, USA

3. Privy Council vs House of Lords

4. *Obiter Dicta* of English Judges - legal writing in textbooks and periodicals

Rondel v Worsley 1968
- Lords after 7 days of argument and citation of 92 cases
- Barrister is not liable in tort for the negligent presentation of a case in court and the preliminary work connected therewith

- obiter : solicitor acting as advocate 出庭律師 was entitled to the same immunity 免責 (followed in Saif Ali v Sydney Mitchell 1980 and thus elevated to the status of *ratio decidendi*

- *obiter* : barrister would not be immune from an action in negligence in relation to matters unconnected with cases in court

Hedley Byrne v Heller 1964
- plaintiff ask for reference from a bank, said OK

- held no negligence as duty excluded by disclaimer 不承諾,

obiter : HL said unanimously that there was a legal duty of care in making statements whenever there was a special relationship between the parties --- reserved opinions of the five Lords delivered after listening to 8 days of argument --- obiter followed as such in subsequent cases.

@ How other thinkers think of what law is? (1)

Natural Law Theory 自然法

The term “natural law” is ambiguous. It refers to a type of moral theory, as well as to a type of legal theory, but the core claims of the two kinds of theory are logically independent.

It does not refer to the laws of nature, the laws that science aims to describe. According to natural law moral theory, the moral standards that govern human behavior are, in some sense, objectively derived from the nature of human beings and the nature of the world. While being logically independent of natural law legal theory, the two theories intersect. According to natural law legal theory, the authority of legal standards necessarily derives, at least in part, from considerations having to do with the moral merit of those standards. (Internet Encyclopedia of Philosophy)

One of the best descriptions of Natural Law is that it provides a name for the point of intersection between law and morals.

Aristotle (384-322 a.C.) just = lawful, fair, virtuous

"all beings by their nature have within themselves inclinations [or dispositions] which direct them to the end which is proper to them". (end = good) Natural law is what is just at all times and in all places independently of the fact that it has been decreed. (just by nature and legal just) . Justice is a state of mind than encourages man to perform just actions. Natural justice is set by nature, which renders it immutable and valid in all communities.

Circero: (106-43 B.C. Roman Lawyer, Stoic philosopher) Natural Law is higher law, discoverable by reason, 3 components of natural law:

1. Right reason in agreement with nature,

2. It is of Universal Application.

3. A sin to alter it, impossible to repeal, God is the author of law.

St. Augustin (354-430) "What are states without Justice but robber bands enlarged."

St. Thomas Aquinas (1225-74) (Summa Theologia) Law that fails to conform to natural or divine law is not a law at all.

<u>4 categories of law:</u>

1. Eternal Law - divine reason know only to god.

2. Natural law - participation of the eternal law in rational creatures discoverable by reason.

3. Divine law - reveal in scripture.

4. Human Law - supported by reason, enacted for common good and derived from natural law.

Hugo Grotius: (1583–1645) Named the father of international law.(1625; On the Law of War and Peace) is considered one of the greatest contributions to the development of international law. International law purported to be founded on natural law. He is normally associated with the secularization of natural law. He said: "even if god did not exist, natural law would have the same content. " ; " even god cannot cause two times two not to equal four."

Sir William Blackstone: (1723–1780) was an English jurist, judge and Tory politician of the eighteenth century. He declared that English Law derives its authority from natural law, capable of nullifying enacted law in conflict with natural law. but....

Jeremy Bentham: (1747–1832) was an English philosopher, jurist, and social reformer regarded as the founder of modern utilitarianism. his famous axiom the principle that "it is the greatest happiness of the greatest number that is the measure of right and wrong" He was a leading theorist in Anglo-American philosophy of law, and a political radical whose ideas influenced the development of welfares. He advocated for individual and economic freedoms, the separation of church and state, freedom of expression, equal rights for women, the right to divorce, and the decriminalizing of homosexual acts. He said .... “Natural Law is among other things

a mere work of fantasy.”

Natural Law and Natural Rights 自然法與自然權利

Modern age with the birth of science, (quantitative materialistic conception of nature) natural law tends to pass from an objective interpretation to a subjective consideration. (natural rights) Natural rights are not derivative from natural law but are the underived, primary, and fundamental moral feature of humanity a beginning of such a theory of subjective rights is to be found in the seventeenth century in Grotius and Hobbes's thought.

* America revolution against British Colonial ruling was based on an appeal to natural rights.

Declaration of Independence 1776: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty, and the Pursuit of Happiness**."** (Thomas Jefferson)

Natural rights: is very often linked to natural law. To many thinkers, natural rights are the claims or entitlements we have by virtue of being rational beings. We can have a natural right to do or to have something, such as the right to protect our own lives.

- Thomas Hobb (1558-1679) under his social contract theory, Law and government are required to protect order and security, we must therefore surrender our natural freedom to the government in order to create an orderly society. "Life is solitary, poor, nasty, brutish and short" In order to escape the state of nature, peace is the first law of nature. We mutually divest ourselves of certain rights for peace. Such agreement between the people and the government need to be honoured. A natural right to preserve our life.

- **John Lock** (1632-1704) According to Locke, we are born into perfect freedom. We are naturally free. We are free to do what we want, when we want, how we want, within the bounds of the "law of nature" While John Locke wrote his Second Treatise of Government in 1689, Locke wrote:

"To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."

Social contract theory, in his view, preserved the natural rights to life, liberty, and prosperity, and the enjoyment of private rights, property rights, and the pursuit of happiness. Lock argues that our natural right to freedom is constrained by law of nature. Lock derive natural rights from natural law。Lock even think people have the right to overthrown tyranny.

- **Rousseau (1712-18)** : "man is born free, but everywhere he is in chains," Rousseau asserts that modern states repress the physical freedom that is our birthright, and do nothing to secure the civil freedom for the sake of which we enter into civil society. Legitimate political authority, he suggests, comes only from a social contract agreed upon by all citizens for their mutual preservation. Social contract is an agreement between individual and the community, and become part of the general will。With total legislative authority, the law may legitimately infringe upon these rights, the law may legitimately infringe upon this rights. He is thus a paradox.

Fall and come back of Natural law as Human Rights

Natural law theory lost its importance in the 19th century because of two reasons. The rise of Legal Positivism and non-cognitive in ethics spawned a profound skepticism about natural law. If we cannot abjectly know what is right or wrong, natural law principles are little more than opinions.

20th Century witnessed a renaissance in natural law theory. e.g. Charter of the United Nations, Universal Declaration of Human Rights, and subsequent Human Rights Declarations. After second world war, the Nuremberg War Trial regenerate natural law ideas. Judges did not appeal to natural law but judgments represents and

important recognition that law is not necessarily sole determinant of what is right from wrong.

Lon Fuller (1902-78) secular natural law, a legal system has the specific purpose of subjecting human conduct to the governance of rules. In Lon Fuller's 1969 book "The Morality of Law", Fuller set out the story of King Rex, as a cautionary tale of the need for clarity, consistency and predictability within legal systems. Profoundly influenced by the horrors of the 20th Century, in particular the Nazi regime in Germany and the Stalinist regime in the USSR, Fuller desired to establish certain benchmarks for legal systems based on his view of the "inner morality of the law."

Fuller argued that the inner morality of a legal system was based first on the morality of duty (the duty to provide basic rules for the ordering of society) and then the morality of aspiration (the aspiration of excellence within a legal system). Though Fuller say these 8 principles are moral, they appear to be essentially procedural guides to law making and operation.

In his book "The Morality of Law", Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law:

1. Laws must exist and those laws should be obeyed by all, including government officials.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
4. Laws should be written with reasonable clarity to avoid unfair enforcement.
5. Law must avoid contradictions.
6. Law must not command the impossible.
7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
8. Official action should be consistent with the declared rule.

@ Human Rights and Law

香港教育學院管治與公民研究中心

《基本法》教育計劃 (教師工作坊)

12/12/2009

有關人權歷史的簡介　　黃覺岸

甚麼是人權？顧名思義，即指世界上人類成員應享的權利(所以近年興起的動物權益運動與此無關)。第一次世界大戰以前，普遍認為人權問題僅屬一國內務，而國與國的歷史、文化、宗教、風俗、傳統等差異又大，故無現在已有國際定義的人權觀念；就是今天各地人們亦各有不同理解，觀念仍在日日發展。無論如何，爭論人權的定義，總勝於否定其本身的重要。

人權與法律制度、法治精神、憲政制度的關係密不可分，但人權觀念由來久遠，並非由法律產生或衍生，只是歷史上各立憲運動和律例制定，落實了人權觀念，促進了它的發展。例如香港的《基本法》和《人權法》，便促進和改善了香港的人權狀況。

人生而有某種權利的觀念，古典時代已經萌芽。我國春秋戰國時代的儒家思想提倡仁政，要求統治者以民為本，強調以「人皆有不忍人之心」行「不忍人之政」，早就隱含人道與人權意識。

古希臘自倫理學始，強調人的重要，量度萬物要以人作中心。繼有民主政體，各城邦依自己的法律辦事，而法律背後又有正義觀念。至於如何定義正義一詞，每個城邦都不同。例如詭辯學家 Thrasymachus 有名言：正義只是強者的定義（Justice is nothing but the advantage of the stronger.），亦有哲學家認為公平並不存在，純粹取決於法官的思想，而不同城邦的法律又不相同，甚至經常矛盾，相同行為在此地屬違法但他邦則無罪，或者相同罪名也有不同刑罰。縱然每個人都希望實現正義，落實時標準又不盡相同，莫衷一是，故此，當時的哲學家希望在一般「形式法律」之上，建立更高的「自然法」（natural law）觀念。

亞里士多德認為正義是「每個人得到他應得的部份」。他把正義分為「矯正正義」（用懲罰手段矯正不正義的行為）、「分配正義」（根據一定的標準，將利益或負擔公平地分給所有成員）和「程序正義」，這些觀念一直沿用至今。

儘管古希臘已有以人為本、人較天地重要、自然法等觀念，與及提倡民主法治的城邦制度，當時的人權觀念仍與今天相去極遠，就連最具智慧的柏拉圖和亞里士多德，也視奴隸制度為天經地義。那時雅典人口約二十五萬，但僅八萬人屬於「自由人」，享有較完整的政治和法律權利，其餘都是奴隸。

到了中古時代，哲學與神學結合，並成為其婢女，自然法的觀念式微，一切以神的意志為依歸。耶教強調人人平等，人人皆是上帝的兒女，同時亦帶出如私隱的現代人權觀念。

當代憲政思想權威 Carl J. Friedrich（1910-1984）認為，西方的人權演進分為三個步驟，分別是十六十七世紀、十九世紀和二十世紀。

十六十七世紀時，人們只關心消極的個人權利，強調某些領域屬於個人的絕對權利，政府不得干預，它們包括信仰自由、表達自由、免於非法逮捕和拘禁的自由等。具代表性的思想家是英國的洛克和法國的盧梭。洛克在《政府論》說：「人類是自由、平等和獨立的，人權是天賦的，這種權利既不能被剝奪，也不能轉讓」，「任何人不得侵害他人的生命、健康、自由或財產」。他亦一再強調政府的功能只限於保護人民的固有權利，不能干預人民的自由與掠奪人民的財產。盧梭在《社會契約論》中指出：「每個人生而自由、平等」，「於棄自己的自由，就是放棄作為人的資格，就是放棄作為人類的權利」。這類「天賦人權」學說解放了從當時的「王權神授」與國家至上的統治思想，成為今天各國的制憲基礎。

英國在 1679 年頒佈了《人身保護法》，1689 年頒令《權利法案》，這些憲法性文件最早確認了人民的權利和自由，限制了專橫的王權。

1776 年美國在《獨立宣言》宣佈「人人生而平等」，造物主賦予了他們某些不可轉讓的權利，包括生命權、自由權和追求幸福的權利。馬克思譽之為第一個人權宣言。

1789 年法國的《人權宣言》指出，「人們生來而且始終是自由平等的」，「任何政治結合的目的，都在於保存人的自然和不可動搖的權利，這些權利就是自

由、財產、安全和反抗壓迫」。這宣言以序言形式載入了 1791 年的憲法。

到了第二階段的十九世紀時，人們轉而關心擴大選舉權利。十九世紀中葉以前，西方各國對選舉權限制甚多，要求投票者先有一定的財產及教育程度，其餘民眾則無權參與政治。

至第三階段的二十世紀三十年代，西方的資本主義國家皆接受早期社會主義的一些看法，認為政府有務給予人民某程度的生活保障及必要的福利，這一看法納入在許多國家的憲法或主要法律之中，發展到後期成為經濟社會權利的人權。舉例說，據民國三十五年通過的《中華民國憲法》，人民具有工作能力者，國家應予以適當之工作機會（152 條），國家為謀社會福利，應實施社會保險制度，人民之老弱殘廢，無力生活，及受非常災害者，國家應予以適當之扶助與救濟（155 條），學齡兒童一律受基本教育，免納學費。其貧苦者，由政府供給書籍（160 條）。

法律方面，前述的天賦人權與社會契約理論復興了自然法（natural law）的觀念，法律的有效性與道德連成一線，發展出「惡法非法」的學說，認為倘法律違反正義到不能容忍的程度，便是不義的法律，人民有權不遵守。不過，此說法並非金科玉律。十九世紀時商業法律發展興盛，有人認為法律與道德應涇渭分明，沒有必然關係，法律實證主義（legal positivism）成為主流思想。例如合約精神指合約制定的自由，不問是否合理，甚而衍生「惡法亦法」的講法，指法治

是連不合理的法律也要遵守，否則社會難言穩定。直到今天，法律與道德的關係應當如何，還是理論界爭論不休的議題。

二十世紀兩次大戰裡，很多暴政都納入法律授權的形式，縱使人權橫遭踐踏，也於法有據，於是超越一般法律甚至國家的自然法觀念再次得以發展，成為整套我們今天所理解的人權觀念。

大戰後成立了聯合國，在 1945 年 6 月 26 日於舊金山發表的《聯合國憲章》宣佈：「我聯合國人民，同茲決心欲免後世再遭今代人類兩度身歷慘不堪言之戰禍，重申基本人權，人格尊嚴與價值，與及男女與大小各國平等權利」。

《世界人權宣言》在 1948 年通過，把平等、自由、安全、財產等傳統的基本人權概念加以規範，使人權問題超出一國一地，成為國際問題，人權也從國內法的領域擴展到國際法。當然，這個發展也非突然冒出，在此之前國際法上特別有關戰爭的公約早已發展了一些跨國原則，戰爭時也得保障基本人權(假如真獲遵守的話)。例如 1864 年《日內瓦公約》保護醫務人員和醫院設施，1926 年《禁止奴隸買賣條約》將禁奴提升至國際責任等。

大家所熟知並在本港有效的，是聯合國於 1966 年通過的《公民權利和政治權利國際公約》和 經濟、社會、文化權利國際公約》。1979 年聯合國人權委員會通過《發展權利宣言》，視發展權為另一項基本人權，各國有義務合作確保發展和消除發展的障礙，以促進基於主權平等、互相依賴、各國互利與合作，第三

世界國家有自由開發物質資源，自由地發展經濟事業的權利，形成了新的國際經濟秩序。

自上世紀六十年代起，先進國家的人民已獲保障基本生活，生存權、就業權、受教育權等已經不是最逼切的人權議題，隨之而來的是環境污染、環境公義、噪音等關於生活品質的經濟人權話題。

晚近的人權發展日趨國際化，西方國家與發展中國家每天爭論不休。1976年卡特出任美國總統後，將人權列入其外交政策之中，接受美國援助的國家須改善人權狀況，國務院要每年向國會提出外國的人權狀況報告，做法維持到今天。

以下列出與人權相關的主要爭論：

（一） 人道主義干涉的權力：十七世紀國際法學家提出，據格老秀斯闡述，如某國野蠻和廣泛地虐待其本國國民，震驚了國際社會的良知，其他國家為制止之而武力干涉是合法。原意雖出於正義，但也有遭濫用之例，成為大國佔領和侵略弱國的藉口。

（二） 國家主權有限論：指人權應當無國界，各國加入聯合國簽署《聯合國憲章》後便承擔了保護和促進人權的責任，國家主權應受到限制。

（三） 標準當統一，人權當絕對化：各國應遵守統一的標準，各國政府

不得藉口維護國家安全和法律，開脫侵犯人權的行為。

（四）　人權是國際外交的一部分。

（五）　聯合國應設立高級專員，國際社會應設立大家認同的國際人權法庭，以處理個別國家侵犯人權的情況。

回到本文最初，人權觀念始終因為不同地方的傳統與文化，難以定出一個絕對的標準。令人欣慰的是人權觀念在全球各地包括香港皆在進步，而人權亦成為教育的一部分，再不是僅流於空談了。

(Note: This article is prepared for educational advancement purpose. The writer intends it to be copy left.)

What Are Human Rights?

Human rights are intrinsic values that give all human beings dignity. The characteristics of Human Rights are that they are claimed to be the birth right of all human beings and thus are universal. Human Rights attached to each human beings and emphasis their inherent dignity and equality of all human beings. Human Rights cannot be waived or taken away. Because it is universal, it becomes an obligation upon each state to respect, protect and fulfill human rights. Because of its Historical development, (see later) Human Rights are internationally guaranteed and legally protected locally.

Does Chinese have Human Rights Nature?

Human Nature - A search for Common secular inquiry and human reason
400 B.C.E. est. - Mo Zi 墨子 founded Mohist School of Moral Philosophy in China
Importance of duty, self-sacrifice, and an all-embracing respect for others – "universally throughout the world"
Concept of "loving all equally" 兼愛
300 B.C.E. est. – Chinese sage Mencius
Wrote on the "human nature"–Man's nature is good 人之初，性本善
Mencius : "The people come first; the altars of the earth and grain come afterwards; the ruler comes last. 孟子曰："民為貴，社稷次之，君為輕。
Everyone has a heart that cannot bear people suffer 人皆有不忍人之心

Definition

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in **fundamental human rights**, in the **dignity and worth of the human person** and in the **equal rights of men and women** and have determined to promote **social progress** and **better standards of life in larger freedom.** Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, ...

鑑於聯合國國家的人民已在聯合國憲章中重申他們對基本人權、人格尊嚴和價值以及男女平等權利的信心，並決心促成較大自由中的社會進步和生活水平的改善,鑑於各會員國都已誓願同聯合國合作，以促進對人權和基本自由的普遍尊重

和遵行,鑑於對這些權利和自由的普遍瞭解，對於這個誓願的充分實現，有很大的重要性, ... (Preamble, UDHR)

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 人人有資格享受本宣言所載的一切權利與自由，不分種族、 膚色、性別、 語言、宗教、政治或其他見解、國籍或社會出身、 財產、 出生或其他身份等任何區別。
(Art. 2, UDHR)

Human rights referenced in Preamble,
Article 1 (Purposes and Principles)
Article 55(c) (UN shall promote)
Article 56 (Members pledge themselves to take joint and separate action)

Art. 1 The Purposes of the UN are…
(3) To achieve international cooperation…in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 55: the United Nations shall promote:
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion

Article 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

UN Charter, Article 68:
The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Human Rights are traditionally classified into 5 main categories: Civil Rights, Political Rights, Economic Rights, Social Rights, and Cultural Rights. Well known examples of Human Rights are:

Economic, Social and Cultural Rights: ICESCR

Negative rights – freedom from government intrusion
Economic, Social and Cultural Rights:

Positive rights – right or entitlement

- Right to life (Right to Health, Food, Water, Education, prenatal care)
- Right to health (including mental health, reproductive health, sexual health, etc.)
- Right to Property (Right to social security, housing, collective right of indigenous people)
- Right to privacy
- Right to education
- Right to Work, Food, Clothing, Housing
- Equality Rights
- Equal Protection under the Law
- Prohibition of Arbitrary Arrest, Detention, Exile
- Right to Privacy
- Right to Nationality
- Freedom of Movement and Residence, Right to Leave, Seek Asylum
- Right to Marry and have Family
- Right to Freedom of Thought, Conscience, Religion and Assembly
- Right to participate in the government
- Right to Social Security, Employment, Rest, Leisure, Education, Adequate Standard of Living
- Right to Non-Discrimination
- Right to Effective Remedy

(Duties to community to ensure respect for the rights and freedoms of others, meet just requirements of morality, public order, and general welfare (Art. 29))

Civil and Political rights: ICCPR

- Self –determination
- Prohibition of arbitrary deprivation of Life, arbitrary interference with privacy
- Freedom from torture,
- Right to Vote
- Right to Fair Trial
- Right to Life
- Fair Trial
- Privacy Rights

- Integrity of the Person
- Rights of freedom of speech, assembly and association. (right to form and join trade unions, collective bargaining)
- Equality under the law
- Right not to be imprisoned for debt
- Right of the child to be protected

Conflicts:
Invasion of privacy v. freedom of press
Freedom of expression v Hate Speech/Defamation

So, human rights are wider than we commonly perceive, it also include:

The creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, higher standards of living, full employment, and conditions of economic and social progress and development; promote solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (Article 55)

General Limitations to Human Rights:

Freedom of religion- State may impose limits prescribed by law as necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.
In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (ICCPR Derogation Art. 4)

#Rights May be restricted for public order, health, morality or national security.

"The exercise of the rights provided for in paragraph 2 of this article carries with it

special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
For respect of the rights or reputations of others; and (b) For the protection of national security or of public order , or of public health or morals." (Article 19: freedom of expression)

#Limitation must be set in clear, precise terms within law, with a legitimate aim and with Proportionality, that means the limits must be necessary (pressing social need), measure must be minimum requirement to achieve purpose of order and security.
"No restrictions may be placed on the exercise of this right other than those imposed in **conformity with the law** and which are **necessary** in a **democratic society** in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." (Article 21: right of peaceful assembly)(similar provision in Art 22 for freedom of association)

No derogation may be made under this provision:
Life, prohibition of torture, or cruel, inhuman or degrading treatment or punishment, Prohibition of slavery, Prohibition of imprisonment because of an inability fufill a contractual obligation. The principle of legality in criminal law, recognition of everyone as a person before the law, freedom of thought, conscience and religion. (ICCPR Art. 4 (2))

Human Rights History/Instruments

Remember What is natural law and natural rights theory?

The Petition Of Right - 1628 (UK)
This petition was sent by the English Parliament to King Charles I, demanding that the King could not tax the people without the Parliament’s consent nor imprison people without cause.

The Bill Of Rights - 1689(UK)
This document set out the political and civil rights, including the freedom to elect Members of Parliament, the protection of free speech in Parliament and that the king or queen could not interfere with the law.

The Declaration Of The Rights Of Man And Of The Citizen - 1789 (French)

This French Declaration set out the universal and inalienable rights of men/citizens. It stated that all are born equal and free, all can participate in civil and political life, can think and speak freely, be presumed innocent until proven guilty and that all have the right to own private property.

The Bill Of Rights– 1789 (USA)

This is made up of the first ten amendments to the U.S. Constitution including the freedoms of speech, press and assembly, the right to a fair trial and freedom from unreasonable search and seizure.

International Committee for the Red Cross (1863)

The Geneva Conventions – 1864-1899- 1907-1977

These treaties focused on alleviating the effects of war on soldiers and civilians. The conventions state the neutral status of the sick and wounded, allow the provision of protection and relief for the wounded and establish the humane treatment of prisoners of war.

Hague Conventions (1899 and 1907)

League of Nations and the International Labor Organization (1919)

The Atlantic Charter Between the United States and Great Britain (August 14, 1941) 大西洋憲章

During World War II (1939-45), the United States and Great Britain issued a joint declaration in August 1941 that set out a vision for the postwar world. In January 1942, a group of 26 Allied nations pledged their support for this declaration, known as the Atlantic Charter. The document is considered one of the first key steps toward the establishment of the United Nations in 1945. The document, which was not a treaty, stated that the two leaders “deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.”(at that point, the United States had not yet entered the war (it would do so in December of that year).)

Response to World War II

56 million military and civilian deaths , Holocaust: 6 million European Jews, Roma, homosexuals, others considered to be threats. Refugees in Europe and survivors of

atomic bombs in Japan, Leaders of Allied Powers formed the United Nations. NGOs lobbied for human rights to be included in the purposes of the new international organization.

Aftermath of World War II

Roosevelt's Four Freedoms Speech (January 6, 1941)

Roosevelt insisted that people in all nations of the world shared Americans' entitlement to four freedoms: the freedom of speech and expression, the freedom to worship God in his own way, freedom from want and freedom from fear. After Roosevelt's death and the end of World War II, his widow Eleanor often referred to the four freedoms when advocating for passage of the United Nations' Universal Declaration of Human Rights. Mrs. Roosevelt participated in the drafting of that declaration, which was adopted by the United Nations in 1948.

The Nuremberg and Tokyo Tribunals

U.N. Charter adopted in San Francisco, June 26, 1945

Creation of the United Nations (1945)

The Preamble to the United Nations Charter states that the "Peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

Modern Protection of International Human Rights :

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights.* The Declaration enumerates civil, political, economic, social, and cultural rights, but the Declaration contains no provisions for monitoring or enforcement.

The Universal Declaration Of Human Rights - 1948 (United Nations)

The Universal Declaration of Human Rights (UDHR) is part of the International Bill of Human Rights. The thirty articles cover the rights of the individual such as the freedom from slavery; political and civil rights such as the freedoms of speech and association; and economic, social and cultural rights such as the right to education and adequate housing.

The rise of International Human Rights in the 1970s

A move from rights as a politics of the state to the morality of the globe. A move that had failed to materialize in the early- and mid-twentieth century. Human rights became a moral alternative to bankrupt political utopias. The last utopia – one that became powerful and prominent because other visions imploded (Moyn). Human rights are only a particular modern version of the ancient commitment to the cause for justice - The Human Rights movement!

The Human Rights Movement: ”The international human rights movement is made up of men and women who gather information on rights abuses, lawyers and other who advocate for the protection of rights, medical personnel who specialize in the treatment and care of victims, and the much larger number of persons who support these efforts financially and, often, by such means as circulating human rights information, writing letters, taking part in demonstrations, and forming, joining, and managing rights organizations. They are united by their commitment to promote fundamental human rights for all, everywhere.” (Aryeh Neier)

The International Covenant On Civil And Political Rights – 1976

It covers the civil and political rights, such as the right to life and liberty, political participation and non discrimination.

- Prohibits discrimination on the basis of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” without regard to citizenship. Prohibits torture and cruel, inhuman or degrading treatment or punishment (personal integrity)
- Prohibits slavery
- Limits the death penalty (in countries that still allow it) to the most serious crimes committed by persons over 18 Prohibits arbitrary arrest or detention
- Protects freedom of movement and residence Protects the right to trial, presumption of innocence, right to a lawyer, right to an appeal, freedom from self-incrimination, and freedom from double jeopardy Protects freedom of opinion and expression Protects freedom of association and assembly

(Its contents are adopted in the Hong Kong Bill of Rights Ordinance), (Adopted the General Assembly In 1966)

The International Covenant On Economic, Social And Cultural Rights – 1976

This covenant covers economic, social and cultural rights such as the right to work for fair wages, holiday and leisure time, the protection of the family and the right to adequate food, housing and clothing. Right to work and make a "decent living for themselves and their families"

- Safe and healthy working conditions
- Right to form trade unions with the right to strike
- Right of everyone to Social Security, including social insurance "widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society" Right to adequate food, clothing and housing and to the continuous improvement of living conditions
- Right to education
- Right to heath care
- Economic rights are subject to each county's ability to provide such rights progressively as its resources permit.

Signed but not ratified by the United States

(Adopted the General Assembly In 1966) (Its contents are adopted in the Hong Kong Bill of Rights Ordinance)

Other International wide Human Rights Instruments

Genocide Convention (1948)

Race Convention (1969)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1981)

Convention on the Rights of the Child (CRC) (1990)

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)(18 December 1990)

Convention on the Rights of Persons with Disabilities (13 December 2006)

Convention Against Genocide (1948)

Convention on the Elimination of Racial Discrimination (20 November 1963)

Convention Against Torture (1987)

Migrant Workers Convention (2003)

Regional Instruments on Human Rights

European Convention on Human Rights (1950) (EU developed a European Court of Human Rights)

American Convention on Human Rights (22 November 1969)
African Charter of Human Right (25 January 2005)

Progressive Realization
Allows governments to take steps towards the progressive achievement of the full realization of human rights.

The International Human Rights Regime

One of the fundamental purpose of the UN is to promote human rights, the regime was evolved within the United Nations:
Security Council
General Assembly
Economic and Social Council
Commission on Human Rights
Sub-commission on the Promotion and Protection of Human Rights
Commission on the Status of Women
Commission on Crime Prevention and Criminal Justice
International Court of Justice
International Criminal Court
Office of the High Commissioner for Human Rights (created by the General Assembly in 1993)

UN Human Rights Council, previous Commission on Human Rights (1946-2006). It consists of 47 members, elected by majority vote in General Assembly (including countries with questionable human rights records), 13 seats Latin America & Caribbean, 6 Eastern Europe, 7 Western Europe and others, Africa & Asia have majority. The Council promote human rights education, serve as a forum for dialogue on thematic issues, make recommendations to the General
Assembly on developing new human rights standards. It also prevent human rights violation through dialogue and cooperation and immediate response to human rights emergencies.

Human Rights Committees:
- Committee on Economic, Social and Cultural Rights ICCPR
- Committee on the Elimination of Racial Discrimination CEDAW
- Committee on the Elimination of Discrimination Against Women
- Committee Against Torture

- Committee on the Rights of the Child
- Committee on Migrant Workers
- Committee on the Rights of Persons with Disabilities
- Committee on Enforced Disappearances

@ Rule of Law vs. Rule by Law

(Due Process of Law in United States)

Meaning ...

The rule of law is a term that is so commonly and popularity used but quite difficult to define. The rule of law is like the notion of 'the good'. Everyone is looking for the good, although we hold different ideas about what the good is.

Actually it is neither a rule nor law, but a glorious set of principles, with ideals of what law should be, according to which, the government treats each individual equally and fairly regardless of racial, gender, educational, or economic differences. The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. Thus, law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according equally.

It is always say that the rule of law means the government of law, not men. But aren't law is made and enforced by men? 'the rule of law, not man'; 'a government of laws, not men'; 'law is reason, man is passion'; 'law is objective, man is subjective'. (And women?)

British tradition of governance is that Government must act according to law and remedy should be available in ordinary courts for unlawful acts of government, it refers to various established legal principles imposing limitations on governmental authority. This view is best expressed by English legal scholar Albert Venn Dicey. (Below)

Rule of law emphasis that our government should be government of law, not of man, this rule based government is now quite commonly accepted through out the world. The framers of the U.S. Constitution deliberately incorporate it into the framework of the Constitution by expressly limiting the government's power. (Separation of Power to ensure no one has absolute power and stand above the law)

Rule of law can also be viewed as a doctrine of political morality that aims at ensuring the correct balance of rights and powers between individuals and the state.

Rule of law is not the other name for democracy, but many societies use democratic means to determine who has the authority to create valid Law, and give legitimacy to the law, as representatives of the people create the law, people are more willing to be bound by it. It is also not the same as Human Rights which stands for universal norms and values. The term rule of law cannot be found in ICCPR or ICESCR. (With respects, many people who write about the rule of law include democracy and human rights within its definition.)

Even a dictatorship regimes need to have a stable social order and thus need to develp a proper legal system with effective legal rules, that can ensure certainty, predictability, security in running of the society and important for economic development. The essentials of rule of law are about government officials and citizens acting in accordance with same legal rules. (We may name that is rule by law, of course)

Rule of law 法治 vs Rule by law 依法而治 ... What is the difference?

Do Chinese traditional thoughts recognize the concept of rule of Law as we now understand?

The Definition of the Legalist School 法家 .... (fa in Chinese means pattern of law)

司馬談 ---(史記) 論六家要旨: 法家 .... **不別親疏，不殊貴賤，一斷於法，**則親親尊尊之恩絕矣。可以行一時之計，而**不可長用也**，故曰嚴而少恩。若尊主卑臣，明分職不得相踰越，雖百家弗能改也。(法家主張嚴刑峻法卻刻薄寡恩，但它辨正君臣上下名分的主張，則是不可更改的。)

Historian Ssu-ma Tam (145-86 B.C) (Writer of the first great dynastic history in China, "The Historical Records" in his work titled "On the Essential Ideas of the Six

Schools" define the thought of the school law (Fa Cha) .. whether close relatives/friends or not, noble or the ordinary, all decided by the same law)

In short, traditional Chinese attitude towards law is law must be obeyed by the people, it must be effectively implemented, it is instrumental to proper governing of the society. It is accepted that law, in order to be effective, can be harsh; but also emphasis that law should be equal to everyone. (law not etiquette)

Aristotle:(Philosopher) It is a ‘Government by laws was superior to government by men’

Friedrich Hayek (Austrian economist, political theorist) published an influential writing adding meaning to the concept of rule of law. “The Origins of the Rule of Law,” (1960) Hayek traced the history of the concept of the rule of law through many centuries. Starting with the Greek and then the Roman philosophers, the British philosophers, and the French enlightenment, Hayek identified from these writings the ideas represented by the words *the rule of law*. Hayek argued persuasively that this concept has been understood, expressed, and advocated by philosophers for more than two thousand years.

As Hayek explained, the rule of law means that people do not have to answer to the arbitrary decisions of governmental officials; instead, they guide their actions by what is prohibited by a clearly defined law. Freedom, therefore, means answering only to a well-defined, previously established law, rather than to the arbitrary and discretionary edicts of some.

Hayek also traced the development of the rule of law concept through the writings of the great British legal scholars: Edward Coke, William Blackstone, David Hume, and of course, John Locke, who had such an enormous influence on our founding fathers. And these writings advocated the same important principles concerning the rule of law: the law should be superior, the law must be non-arbitrary, the law must be enforced by an independent judiciary separate from the lawmakers, the law must treat all persons equally. (Robert Stein, "Rule of Law: What Does It Mean?", 2009, *University of Minnesota Law School*)

Dicey's Three Principles of what Rule of Law is:

(Introduction to the Study of Law and Constitution) 1885

First,

'It means in first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excluded the existence of arbitrariness, of prerogative, or even a wide discretionary authority on the part of the government.... A man can be punished for a breach of law, but he can be punished for nothing else ' (Supremacy of Regular law, absence of arbitrary power, so the power of the government is limited)

Second

'**equality before the law**, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts' (No one is above the law, officials and citizens need to obey the same law, Dicey opposes that officials can entitle to any legal privileges and immunities)

Third,

'the law of the Constitution, the rules which in foreign countries form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts..., thus the constitution is the result of the ordinary law of the land" (Rights not by a constitution but by the ordinary remedies available to every one)

The first two principles by Dicey is so important that it is repeated by nearly all legal writers on Rule of Law later on.

Although the U.S. and UK Governments are founded on principles of democracy, the political reality is, unfortunately, that authorities in power largely ignore Dicey's definition of the Rule of Law whenever they find it inconvenient to their work, same as elsewhere in the common law family including Hong Kong of course.

Lon Fuller: In his book "The Morality of Law", American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the following:

1. Laws must exist and those laws should be obeyed by all, including government officials.

2. Laws must be published.

3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.

4. Laws should be written with reasonable clarity to avoid unfair enforcement.

5. Law must avoid contradictions.

6. Law must not command the impossible.

7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.

8. Official action should be consistent with the declared rule.

Rule of law by Professor Tai 戴耀廷 of HKU

層次一：有法可依 Existence of Law

層次二：有法必依 Regulation by Law

層次三：以法限權 Limitation from Law

層次四：以法達義 Justice through Law

社會主義法治 Socialist Rule of Law ：是在打碎舊的國家機器、廢除舊的法制體系的基礎上建立的。代表了社會主義國家全體人民的最大利益和意志。它包括立法、執法、守法三個方面，要求做到“**有法可依，有法必依，執法必嚴，違法必究**”。其基本原則主要有社會主義民主，法律由國家統一制定和實施，法律面前人人平等等。在社會主義法治國家的框架下，社會主義民主的制度化、法律化，嚴格依法行使國家權力、進行國家管理的原則。包括立法、執法與守法三個方面。(百度百科)

What historical documents started the Rule of Law?

"No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." (Article 39, Magna Carta 大憲章 (1215))

" that the life, liberty, or property of free subjects of the king could not be arbitrarily taken away. Instead, the lawful judgment of the subject’s peers or the law of the land had to be followed. (Article 39 of the Magna Carta)

" Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by **the rule of law**," (The Preamble: Universal Declaration of Human Rights 1948)

Three Reasons for The Wary of the Rule of Law (Brian Tamanaha)

http://content.csbs.utah.edu/~dlevin/conlaw/tamanaha-rule-of-law.pdf

The rule of law does not, in itself require democracy, respect for human rights, or any particular content in the law. Developing the rule of law does not insure that the law or legal system is good or deserves obedience. In situations when the law enforces an authoritarian order, or when the law imposes an alien or antagonistic set of values on the populace, or when the law is used by one group within society to oppress another, the law can be a fearsome weapon. Fidelity to the rule of law in these circumstances serves to enhance legally enforced oppression. It is important to remember that the

rule of law is necessary but not sufficient to a fair and just legal system.

Support for the rule of law can shade subtly into (or be wrongly interpreted as) support for the extension of the reach of law ever further into the social, economic, and political realms. This spreading insinuation of law—sometimes called the juridification of the life world—does not follow from the rule of law itself.

A third reason to be wary of the rule of law is the risk that it may devolve to the rule of judges (or lawyers). An increasing assertiveness by judges in rendering decisions that infringe upon political authorities, especially when interpreting broad clauses like human rights provisions, has been noted in many systems. When this occurs, the judiciary may become the target of political attacks and efforts at political influence, resulting in the politicization of judicial appointments and judging. The judicialization of politics hence leads direct to the politicization of the judiciary, which in turn reduces the autonomy of the judiciary and diminishes the rule of law.

@ Civil Disobedience: A Right or A Crime?

Civil disobedience 公民不服從的行為

Action on the part of citizens in protest against laws regarded by them as unjust. Examples may be refusing to pay taxes, or breaching regulations pertaining to public meetings or public processions. Questions about what (if any) civil disobedience is permissible are related to the **jurisprudential debate over whether or not an unjust law is in fact a law** and also whether a citizen's obligation to obey the laws of his community is unqualified. (Lexisnexis 英漢法律詞典)

Civil disobedience is a symbolic or ritualistic violation of the law rather than a rejection of the system as a whole. The civil disobedient, finding legitimate avenues of change blocked or nonexistent, feels obligated by a higher, extralegal principle to break some specific law. It is because acts associated with civil disobedience are considered crimes, however, and known by actor and public alike to be punishable, that such acts serve as a protest. By submitting to punishment, the civil disobedient hopes to set a moral example that will provoke the majority or the government into effecting meaningful political, social, or economic change. Under the imperative of setting a moral example, leaders of civil disobedience insist that the illegal actions be nonviolent. (Encyclopedia Britannica)

It is therefore important to note:

1. Non-violent resistance, still infringe the law and be a crime.

2. To provoke the majority to think justness in society by submitting to punishment.

3. Offenses could be considered misdemeanors, that means those guilty of the offense may get off by doing a set quantity of hours of community service or merely paying fines.

4. The act can be classified as felonies, ie cause injury and hurt an innocent bystander.

Public Nuisance 公眾滋擾 (Incitement of Public Nuisance, Incite others to Incite Public Nuisance)

An offence at common law which materially affects the reasonable comfort and convenience of a class of members of the community and is so widespread in its effect, that it would not be reasonable to expect one person to take proceedings on their own responsibility. The offence is constituted by an act not warranted by law or an omission to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals or comfort of the community in the exercise of rights common to all of the community. The nuisance does not necessarily have to affect all members of the community or a class in the community, and the issue of whether a sufficient number have been affected to render the nuisance sufficiently widespread is an issue of fact and degree. Once the nuisance is proved and the defendant is shown to have caused it, then, the legal burden is shifted to the defendant to justify or excuse himself, if he fails to do so, he will be liable. To establish the *mens rea* 意圖 of public nuisance, the prosecution must prove that the accused knew or ought to have known that his conduct or omission would result in a public nuisance being committed. It is not relevant that the accused had another object in mind when he committed the public nuisance. Remedies are abatement, and injunction, or damages. 補救有除去滋擾, 禁制令或賠償。(Lexisnexis 英漢法律詞典)

戴耀廷的結案陳詞: (quote)

公民抗命的精神

首先，這是一宗公民抗命的案子。我站在這裏，就是為了公民抗命。陳健民教授、朱耀明牧師與我一起發起的「讓愛與和平佔領中環運動」，是一場公民抗命的運動。在以前，少有香港人聽過公民抗命，但現在公民抗命這意念在香港已是家傳戶曉 ..... 公民抗命的目的並不是要妨擾公眾，而是要喚起公眾關注社會的不公義，並贏取人們認同社會運動的目標。若一個人被確立了是在進行公民抗命，那他就不可能會意圖造成不合理的阻礙，因那是與公民抗命背道而馳，即使最後因他的行動造成的阻礙是超出了他所能預見的 .... 非暴力是「讓愛與和平佔領中環運動」的指導原則。公民抗命的行為，就是佔領中環，是運動的最後一步。進行

公民抗命時，示威者會坐在馬路上，手扣手，等候警察拘捕，不作反抗。我們計劃及希望達到的佔領程度是合乎比例的。我們相信所會造成的阻礙是合理的 .... 我相信我們已做了公民抗命中違法者所當做的，我們期望其他人也會做得到他們所當做的 .... 在一宗公民抗命的案件，公民抗命的方法是否合乎比例，不能抽空地談，必須考慮進行那行動的目的 ... 歸根究底，這是一宗關乎香港法治與高度自治的案件。作為香港法治及憲法的學者，我相信單純依靠司法獨立是不足以維護香港的法治。缺乏一個真正的民主制度，政府權力會被濫用，公民的權利不會得到充分的保障。沒有民主，要抵抗越來越厲害對「一國兩制」下香港的高度自由的侵害，會是困難的。在「雨傘運動」後，還有很長的路才能到達香港民主之旅的終點 .... 我相信法治能為公民抗命提供理據。公民抗命與法治有共同的目標，就是追求公義。

https://theinitium.com/article/20181212-hongkong-occupy-central-trial-record-5-bennytai/?utm_medium=copy

太陽花學運無罪 符公民不服從7要件

2017年03月31日 13:30 中央社

台灣台北地方法院審理後認為，三一八學生運動領袖林飛帆與陳為廷等22人行為符合「公民不服從」概念7要件，對全數被告做出無罪宣判，全案可上訴。

北院說，7要件: 包括

一、抗議對象是與政府或公眾事務有關重大違法或不義行為；

二、須為公開及非暴力行為；

三、須基於關切公共利益或公眾事務目的；

四、符合適當性；

五、符合必要性；

六、狹義比例原則；

七、抗議行為須與抗議對象間具有可得認識的關聯性。

北院表示，這起案子是台灣首次用「公民不服從」概念認定是不是具社會相當性；如果行為符合社會相當性，從中華民國刑法角度看，沒有非難必要性。

3年前太陽花學運（反海峽兩岸服務貿易協議抗爭）期間衍生出3起司法官司，台北地檢署民國104年2月10日偵結。

3案分別是「三一八占領立法院」，起訴時任中央研究院法律學研究所研究員的時代力量籍立法委員黃國昌、林飛帆與陳為廷等22人；「三二三攻占行政院」，依侵入住宅、毀損與煽惑他人犯罪等罪起訴學生魏揚等132人；「四一一路過台北市政府警察局中正第一分局」，起訴學生洪崇晏等4人。

北院今天對「三一八占領立法院」案中22名被告涉犯煽惑他人犯罪、妨害公務與違反集會遊行法等罪宣判。

北院發言人廖建瑜說，「三一八占領立法院」案，檢察官起訴包括3部分，分別為煽惑他人無故侵入立法院建築物及附連土地；立法院外（中山南路）滋擾事件及立法院議場妨害公務事件。

廖建瑜表示，黃國昌、陳為廷、林飛帆與魏揚等人有無煽惑他人犯罪行為部分，法官勘驗光碟後認為，黃國昌等人發表言論時，已有很多民眾翻越圍牆進入立法院，且黃國昌發表言論屬個人言論，無煽惑他人言詞，客觀上不符煽惑要件。

廖建瑜說，黃國昌等人開庭時主張不是無故侵入立法院，也符合「公民不服從」概念；合議庭詳加審酌後認為，確實有符合「公民不服從」概念，認定黃國昌等人不具實質違法，不構成無故侵入的「無故」，有正當事由。

廖建瑜表示，這起案件，縱然有公訴人所指號召他人進入立法院行為，但這些意見表達不具實質違法性，有正當理由，不符煽惑他人要件。1060331

(中央社)

Some Historical Events:

1. Glorious Revolution in Britain (1689 Bill of Rights)

2. Mahatma Gandhi's campaigns for independence from the British Empire. (1940s)

3. South Africa in the fight against apartheid. (1950s-1994)

4. American civil rights movement.(1941-1954)

5. Rose Revolution in Georgia. 格鲁吉亚 玫瑰革命 (2003)

6. Orange Revolution in Ukraine. 乌克兰 橙色革命 (2004)

7. Umbrella Movement in Hong Kong ? (2014)

Thoreau, Ghanhi, Dr Martin Luther King and John Rawls:

The concept of civil disobedience originates from Thoreau's 1849 essay "Civil disobedience–a refusal to obey governmental laws as a form of nonviolent protest". Since the publication of this work in 1849, the practice of civil disobedience (sometimes known as non-violent resistance or non-violent direct action) has been used around the world as a form of protest in the various social movements asking for rights in : Labor Rights, Peace, Civil Rights, Women's Rights, Anti-Globalization, Environmental Preservation, Gay Rights, Immigrant Rights, etc.

In 1842 Thoreau stops paying poll tax, 1846 July 24 or 25 Thoreau is arrested for refusing to pay taxes and spends one night in jail until an anonymous donor pays his tax. The reason Thoreau refuse to pay taxes was the then USA has just entered into a conflict with Mexico, he disagrees with the conflict, and he does not want his money to fund military aggression. Thoreau was also an abolitionist and does not want his tax dollars to fund a government that supports slavery. During that night in jail, Thoreau contemplates the nature and necessity of his non-violent protest and delivers lectures about his experience in January and February of 1848. The content of these lectures is converted into the essay "Resistance to Civil Government "which is published later on and has a wide impact and influence Mohandas Gandhi, and Martin Luther King .

Mohandas Gandhi becomes leader of the Indian National Congress in order to protect the rights of Indian nationals under British rule and ultimately to achieve Independence. As party leader he organizes a campaign of non-cooperation with the British Government which includes a boycott against British imports. He even begins spinning his own thread. In 1922 Gandhi is arrested for sedition (inciting rebellion) and is sentenced to 6 years imprisonment. In 1924 Gandhi is released from prison and months later initiates a three week fast to call his followers to remain on the path of non-violent resistance.

In March 1930 Gandhi initiated protest on British salt tax and marches 241 miles to make his own salt with thousands of citizens following him. The British government imprisons over 60,000 people as a response. In August 1942 Gandhi launches Quit India Movement on the heels of WWII to compel the British to withdraw from India, and the British respond by imprisoning the leadership of the Indian National Congress. January 30, 1948 Gandhi is shot in Delhi en route to a prayer meeting. January 26, 1950 India forms constitution and becomes a republic.

Dr. Martin Luther King gains national prominence as a leader during the Montgomery Bus Boycott for anti-segregation protests . (Rosa Parks—refuses to give up her seat on the bus to a white man and as a result the Montgomery Bus Boycott occurs.) He was arrested in Birmingham and jailed on April 16, 1963. While in prison, he wrote his "Letter from Birmingham Jail," in which he states, "…freedom is never voluntarily given…it must be demanded."Dr. King believed that people have a moral duty to disobey unjust laws.

Civil Rights leaders by that time used non-violent protests, civil disobedience, and legal action to change the U.S. Their action includes:

1. Boycotts by refusing to buy goods or services from a business to force it to change policies.
2. Hunger strikes.
3. Petitions letters to get as many people to sign it as possible.
4. Marches and Demonstrations. .(March on Washington: August 28, 1963 Excerpt…"I Have a Dream" As a result of the Civil Rights movement, Congress passed the Civil Rights Act of 1964, which ended all racial discrimination in public facilities such as restrooms, restaurants, buses, movie theaters, and swimming pools.)
5. Strikes
6. Civil Disobedience by breaking the law to get public attention for your course.
7. Legal actions by convincing the judges that the law or policy is unconstitutional. (eg In 1956, the Supreme Court declared segregation on public transportation unconstitutional.) People can also speak at government hearings or meetings and try to convince legislators to change the law.

With the arrival of television, Americans could watch the news every day. The non-violent civil disobedience used by King and others made the civil rights protesters look like good people and made their opponents look hateful, violent, and ugly. People could also hear Dr. King's inspiring speeches. He was a powerful speaker who knew how to change people's hearts and minds.

John Rawls (1971) : (his account and questions)

civil disobedience is a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. On this account, people who engage in civil disobedience are willing to accept the legal consequences of their actions, as this shows their fidelity to the rule of law. Civil disobedience, given its place at the boundary of fidelity to law, is said to fall between legal protest, on the one hand, and conscientious refusal, revolutionary action, militant protest and organized forcible resistance, on the other hand.

This picture of civil disobedience raises many questions. Why must civil disobedience be non-violent? Why must it be public, in the sense of forewarning authorities of the intended action, since publicity gives authorities an opportunity to interfere with the action? Why must people who engage in civil disobedience be willing to accept punishment? A general challenge to Rawls's conception of civil disobedience is that it is overly narrow, and as such it predetermines the conclusion that most acts of civil disobedience are morally justifiable. A further challenge is that Rawls applies his theory of civil disobedience only to the context of a nearly just society, leaving unclear whether a credible conception of either the nature or the justification of civil disobedience could follow the same lines in the context of less just societies. (Stanford Encyclopedia of Philosophy)

@ How other thinkers think of law?(2)

Legal Positivism 法律實証論

The conflicts between natural law and legal positivism is often treated as the most fundamental issue in legal philosophy, dividing the field into two hostile and irreconcilable camps. Positivists characterize natural law doctrines as beliefs based on metaphysical or religious ideas not compatible with the principles of scientific thought.

Extreme views of legal positivists even deny the lawfulness and existence of natural law. They see law as only positive law and consider the superiority of positive law over natural law. Thus, either law is positive or it is not law. They adopt scientific methods to the study of law (only judgments of fact and never value judgments). They separate law from ethics/morals.

Jeremy Bentham: (1747–1832) The origin of **law is command** of the Sovereign. Law which impose no obligations and sanctions are not complete laws but merely parts of law. His disciple **John Austin (1790-1859)** develop further his command theory and say positive law a law strictly so called, is the law by political superiors, and laws improperly so called, is the law by analogy, law by metaphor. Constitutional Law and International Law, are just laws of fashion.

H.L.A. Hart: (1907-1992) Father of modern Legal Positivism. Law as social rules. Law is a system of rules, all societies have social rules. There are rules to moral games, (minimum contents of natural law) and moral rules thus is different to legal rules. Primary Rules in primitive society, secondary rules, rules of change, (legislature) rules of adjudication, (courts) rules of recognition. (impose duty) Valid rules of obligation must be obeyed by members of society, officials must accept the rules of change and adjudication, rule of recognition from internal point of view.

Hans Kelsen (1881-1973) The "**pure theory of law".** Pure means a scientific doctrine of law. The only true theory of law is the science of law that is not contaminated by nature, political ideology, morality, sociology or economy. The only criterion that Kelsen uses to distinguish what is legal and what is not is the norm. Kelsen are interested only in those acts regulated by legal norms. is the existence of a legal norm that governs conduct. Norms are legal if they follow this formula where A

is illicit, specifically, an illicit (in the sense of unlawful) act or condition, while B is the penalty, that is, the punishment for behavior which has broken the rules or is the consequence, of illicitness. Either the norm carries a penalty or it is not legal. It is therefore the most important element in the formulation of the norm is the penalty: the illicit act constitutes the condition for which the penalty is applied. "justice is an irrational ideal: an ideal because it is abstract, and irrational because it is not reasonable, but if anything the result of mere emotionalism or sentiment"

The primary norms (prescriptive) are the rules that require certain behavior by the citizens.

The secondary norms (sanctions) are the rules that establish a penalty for conduct that has violated the primary norms.

Other theories of Law to note

Harm Principle 傷害原則

John Stuart Mill (1806-1873) was a British philosopher who wrote many essays that created rules that people could use to decide what actions were good and bad. One of these essays was titled "On Liberty" , which explained how much control society has over preventing or allowing the actions of a person.

The harm principle states that the only actions that can be prevented are ones that create harm. In other words, a person can do whatever he wants as long as his actions do not harm others. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. If a person's actions only affect himself, then society, which includes the government, should not stop a person from doing what he wants. This even includes actions that a person may do that would harm the person himself.

Harm principal comes from another important principle by Mill called utilitarianism which states that people should only do those things that bring "the greatest amount of happiness to the greatest number of people". So, if a person is trying to decide between two things, he should choose the option that makes the most people happy.

Mill says there is a difference between harm and offense. Harm is something that

would injure the rights of someone else or set back important interests that benefit others. An example of harm would be not paying taxes because cities rely on the money to take care of its citizens. An offense, according to Mill, is something which we would say 'hurt our feelings.' These are less serious and **should not be prevented**, because what may hurt one person's feelings may not hurt another's, and so offenses are not universal.

Not every unwelcome consequence for others counts as a harm. Offenses tend to be comparatively minor and of short effect. To constitute a harm, an action must be injurious or set back important interests of particular people, interests in which they have rights. (what is the threshold for the harm principle? Mill did not give an answer)

Legal Realism 法律現實主義

The view that legal rules are based on judicial decisions given in interest of the larger society and public policy, and not on any dogma or supernatural authority. It defines 'legal rights' and 'legal duties' as whatever the courts say they are. We should investigate law exclusively with the value-free methods of natural sciences。

Oliver Wendell Holmes (A US Judge: 1841-1935) law corresponds to the "prophecies of what the courts will do in fact", to the actual procedure, the experience, and the life of the law". "The common law is not a brooding omniscience in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."

So there is a clear distinction between law and morality, we should consider what law is, what law ought to be. Look at the position of law as a "bad man".

法律是從壞人的視角所構成

https://hk.epochtimes.com/news/2018-03-29/88748278

法律是甚麼的基礎所構成的呢？談法律之時我們被律師的誇誇其談所帶引，甚麼平等，公義，人權，社會正義等等。法律似乎也是由邏輯所構成，特別滿滿的語言邏輯論述貫穿了所有的法庭程序。法律真是由崇高的道德及嚴謹周密的邏輯智慧理性所構成的嗎？並不，這只是表象。

奧利弗霍姆斯（Oliver Wendell Holmes，1841-1935）是名美國唯實論法學家，亦是法官。他用半生審案的經驗告訴大家，法律的運作與道德無甚關連，那只是律師在利用語言魔力的力量；而普通法是由無數單一的案例所組成，普通法靠經驗的累積而非邏輯的推理。

霍姆斯對法律本質的看法極具顛覆性。他直言，法律的具體操作是怎麼一回事，我們若要充分理解，只能從壞人的視角（perspective）去審視，這是他有名的壞人理論（Bad Man Theory）。

他說：如果你想知道甚麼是法律而非其它事情，你一定要從壞人的出發點看法律。壞人只關心實在的結果（material consequences），而知識是幫助他去預計結果。好人不是這樣，好人尋找行為的理由，不論是來自法律之內或之外，並以良心為戒（in the sanctions of conscience）。

筆者的理解，霍姆斯是指律師是壞人的行業，成功律師的精力皆用於預計案件的成敗，成敗主導了這個專業的具體運作，也就是法律的真實運作面目。清楚的是這運作與道德關係甚小。

霍姆斯又說他的理論只是將法律比喻為放在馬前的二輪車（cart before the horse），馬（指律師）的法律責任是估計終點所在（指法庭的裁決結果），避重就輕地將車子推到終點，贏得案件，當中沒有道德的考量。

對於法律，其本質類似宗教的神諭（Oracles）。所有法律的論說只是將各類預言（prophecies）說得準確，並將各條法律原則放進一個互為關連的系統之內。律師的工作是在開始之時就儘可能估計預示各類預言的結果如何反映在案件的裁決中。學習法律，從事法律專業的目的，只是工具主義地估算（prediction）公權力如何在法庭之內運轉。而這個估算的過程並不能單單依賴歸納法的邏輯推理，因為法官也不靠邏輯，而是靠直覺去決定甚麼是對錯。◇

Sociology and Law 法律社會學

The study that sees law is only one of a number of methods of social control. It would be wrong to see that law is a closed system of concepts that stand on its own. Sociologists emphasis on the actual operation of law “in action” ，and its place in society. Some see sociology of law as belonging "necessarily" to the field of sociology, but others tend to consider it a field of research caught up between the disciplines of law and sociology. Still others regard it neither a sub-discipline of sociology nor a branch of legal studies but as a field of research on its own right within the broader social science tradition.

Max Weber (1864-1920) German Sociologist first to provide sociology of law through 3 ideal stages of development:

1. Charismatic: Law prophets who are rulers having extra ordinary personal quality.
2. Traditional: Charisma become institutionalized through descent, passing to successors, new monarchies.
3. Rational: Where a system elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner.

Weber said the rationality of law in western societies is a result of that rationalism of western culture. Law is based on the accepted legitimacy of the law giver rather than mere charisma.

Emile Durkheim (1858-1917) French Sociologist sees law as producing the principle forms of solidarity. Mechanical solidarity is to be found in small scale homogeneous societies. Here most law would be of a penal and repressive nature. Organic solidarity is to be found in more heterogeneous (differentiated) societies where there is less of a common societal reaction to crime and the law becomes less repressive but more restitution. (restored to original position)

Karx Marx (1818-83) and **Friedrich Engel** (1820-95) apply the concept of dialectical Materialism to Law. When Marx was young, he had once describe law as "the bible of liberty", finally say law is a just tool of the ruling class.

Law maintain the social order, represents the interests of the dominant class.

Law is accord an inferior position to economic factors; we absorb our knowledge from or social experience of productive relationship. It is merely part of the superstructure, along with other cultural and political phenomena, determined by the material conditions of a society.

That law simply reflects the economic base, the form and content of legal rules correspond to the mode of production.

They also talk of class instrumentalism, contends that law is a direct expression of the will of the dominant class. They predict that proletariat would seize the means of production and establish a dictatorship of the proletariat. Since law is a vehicle of class oppression, it is unnecessary. In their utopia mode of society, a classless society, law would not be necessary ultimately and wither away.

(*some law protects the interests of the oppressed class, i.e. employment law. Also, traffic law reflects no class difference)

Economics and Law 法律經濟學

Law and economics or economic analysis of law is the application of economic theory (specifically microeconomic theory) to the analysis of law that began mostly with scholars from the Chicago school of economics. With its positive economic analysis, seeks to explain the behavior of legislators, prosecutors, judges, and bureaucrats. The model of rational choice, which underlies much of modern economics, proved to be very useful for explaining (and predicting) how people act under various legal constraints. Richard Posner's (America Judge) book 'Economic Analysis of Law 2007' became one of the classics of the discipline. Law and Economics Assumes: (ch 12 The Economic Application to Law, in his book: The Problems of Jurisprudence1990)

- All people are rational and maximizes their satisfaction.
- Legislation is a deal between interest groups
- Courts interpret the law to provide an authoritative dispute resolution to deals.
- Common law exhibits a remarkable consistence in "wealth maximization and economic efficiency.
- Common Law should maximize society's wealth.
- Law can be reduced to a handful of economic formulas; i.e. cost benefit analysis, prevention of free riding, promotion of mutually beneficial exchanges.
  (You may not agreed that law is based on Economics)

#Feminist Legal Theory 女性主義法理學

The belief that the law has been fundamental in women's historical subordination. The convictions that the historical and continuing exclusions of women from the law's protective domain have injured women. Feminists sought to transform the rules and principles governing particular areas of law so as to make them more responsive to women's needs and more reflective of women's perspectives. This legal theory is dedicated to changing women's status through a rework of the law and its approach to gender, from equality to women to change of system to enable women to contributive positively to society.

Catharine Mackinnon: "Towards a Feminist Theory of the State 1989"
Her book provide a powerful analysis of politics, sexuality and the law from the perspective of women. Using the debate over Marxism and feminism as a point of departure, Mackinnon develops a theory of gender centred on sexual subordination and applies it to the state. Mackinnon argued that there were no inherent difference between men and women, the only real difference is that of inequality and that in patriarchal societies men dominate the lives of women. It is because of their inequality with men that women might appear different.

Carol Gilligan: "In a different voice 1982" She argued that men and women have different ways of viewing the world conceptualizing more problems and approaching the relationship between oneself and others. Men act and interact on the basis of and "ethic of justice" which relies heavily on rights and abstract justice, which is based on the premise that everyone should be treated in the same way. Men see law in term of legal right. Women, on the other hand, relate to others on the basis of an "ethic of care", premised on non-violence that no one should be hurt and focus on responsibility and contextuality. Ethic of care is an essentially female value.

@ The Legal System in Hong Kong (2)

Limitation of Time in Action

An aggrieved party will lose the right to bring or initiate a civil lawsuit after a certain period of time. That is regulated by the *Limitation Ordinance.* It stipulates that most claims based on contract and tort must be brought within six years, while that for personal injuries must be brought within three years, and for the recovery of land and the proceeds of the sale of land, and claims on deeds twelve years

The Legal Profession

Judges

Art 85 of the Basic Law provides that the courts of the SAR shall exercise judicial power independently, free from any interference. In order to ensure judicial independence, judges enjoy "security of tenure," which means that they will be dismissed only for inability to discharge his duties or for mis-behaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges. (Art 89)

Furthermore, judges are immune from legal action in the performance of their judicial function (Art 84). Art 88 of the Basic Law stipulates that the judges shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons of the legal profession and eminent persons from other sectors.

In the case of the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court, the Chief Executive must also obtain the endorsement of the Legislative Council. (Art 90) Art 92 of the Basic Law provides that judges are to be chosen on the basis of their professional qualities and may be recruited from other common law jurisdictions (Art 92)

Barristers 訟務律師

They enjoy the exclusive "right of audience" in CFI, CA and CFA. They are instructed by solicitors only, but not by the lay client, to appear in court or draft legal opinions. They must practice independently, ie they cannot not be an employee of a law firm. They also cannot enter into a partnership with other barristers. Their profession is self-regulated through the Bar Council.

Accountants and certain other professionals may now directly seek advice from ("brief') barristers, without having to go through any solicitors, with the exception that in litigation, a solicitor is still required.

Solicitors 事務律師

They advice clients, represent their interests, draft legal documents for them, and can represent them in court up to the DC level. Their profession is also self- regulated through the Law Society. They have "fiduciary duties" towards their clients, i.e. they must act in utmost good faith solely for the benefits of their clients and they have to avoid conflicts of interests. It is also worth noting that solicitors may be sued for negligence whereas a barrister may generally not be sued for negligently arguing a case before the courts

Legal Executives 法律行政人員

<u>Barrister</u>	**<u>Solicitor</u>**
Right of Audience	Magistrate + District Court (note the ***Mackenzie Rule***)
In Litigation:	
Research and Advice	Most Paper Work - letters - instruct council - prepare bundles of documents

	Conveyance
No!	Probate
	Divorce

Must be instructed by solicitors who's presence is required all the time.
Note: Accountants and certain profession may seek advice from Barristers now.

Senior council followed by junior

Wigs and Gowns	Gowns only
Immunity in Court	Same
Not liable in action pending litigation	Liable for professional negligence

Legal Aid

According to Legal Aid Ordinance, a person with "financial resources" not more than a certain amount may be granted legal aid in civil proceedings in which he is either a plaintiff or defendant. "Financial resources" is calculated according to a complicated formula, which in essence regards a person's "financial resources" as his annual "disposal income" plus his "disposable capital." For claims relating to the Bill of Rights Ordinance, the upper limit on "financial resources" may be waived. A person who receives legal aid has to make a certain percentage of contribution towards the legal costs himself corresponding to the size of his "financial resources".

The Legal Aid Department provides legal representation to eligible applicants by a solicitor and, if necessary, a barrister in civil or criminal proceedings.

Legal aid is available, inter alia, to cases in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. It is also available for committal proceedings in the Magistrates' Courts.

Any person, whether or not resident in Hong Kong, who is involved in the above court proceedings may apply for legal aid. Legal aid will be granted if the applicant is able to satisfy the statutory criteria as to the financial eligibility and the merits for taking or defending the legal proceedings.

Financial Eligibility

How to Calculate Financial Resources？

Financial resources are your monthly disposable income multiplied by 12 plus your disposable capital.

Disposable Income

Monthly disposable income is the net monthly income after various allowable deductions have been made from gross income. The deductions include items such as rent, rates and a statutory allowance for your own living expenses and that of your dependants:

Household Size (No.)	Total Personal Allowances* (HK$)
Applicant only	6,220
Applicant and 1 dependant	10,880
Applicant and 2 dependants	15,490
Applicant and 3 dependants	20,060
Applicant and 4 dependants	26,700
Applicant and 5 dependants	25,060
Applicant and 6 or more dependants	27,950

* Adjusted in February every year in line with the Consumer Price Index A, and every five years in line with the latest Household Expenditure Survey conducted by the Census and Statistics Department.

Disposable Capital

Disposable capital consists of all assets of a capital nature, such as cash, bank savings, jewellery, antiques, stocks and shares, and property. Some assets are not included in the calculation of your disposable capital, for examples, the value of the house you live in, the value of household furniture and effects, personal clothing, tools and implements of trade. If you have reached the age of 60, an amount of capital equal to the financial eligibility limit of the Ordinary Legal Aid Scheme, i.e. $307,130, will not be counted as your capital.

A person within "financial resources" limits may be granted legal aid under the Supplementary Legal Aid Scheme for bringing claims for personal injuries. However,

they will have to contribute a percentage of the damages awarded by the court to a fund to support the continuance of the Scheme. An accused facing a criminal prosecution is guaranteed legal aid without having to go through the means test. Legal aid in civil proceedings will only be granted if the Director of Legal Aid is satisfied that there are reasonable grounds for the applicant to bring a legal action or defend himself in a legal action.

A rejected applicant may appeal to the Registrar of the High Court against the decision of the Director of Legal Aid. The Legal Aid Department also administers the means test for application of legal aid A person granted legal aid may select his own solicitor or barrister if he wants. Otherwise, the Director of Legal Aid will appoint a solicitor or barrister for him from a panel of solicitors and barristers who are willing to take up cases referred by the Legal Aid Department.

Principles of Statutory Interpretation

- the three rules plus S.19 of *Interpretation and General Clauses Ordinance*

Definition:

1. The Literal Rule

In the absence of any apparent ambiguity under this rule, words in an Act must be given their literal meaning even if this results in apparent absurdity. This rule is therefore of no use where there is ambiguity or where the phrase is very broad in its nature. The rule was said to favour precision in drafting.

2. The Golden Rule

Under this rule of interpretation, where the ordinary sense of words leads to an apparent absurdity or repugnancy with the rest of the Act, the apparent grammatical or ordinary sense may be modified so as to avoid that absurdity but no further.

3. The Mischief Rule

An attempt to see what the law was before the making of the Act, what mischief that law did not provide for, and how the Act purported to remove or abate it. In this case, one would be looking to see what was the intention of Parliament. The words of the Act, if ambiguous, would then be interpreted in such a way as to give force to Parliament’s expressed intention to cure the mischief.

S. 19: "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."
Normally, it is a cardinal rule of interpreting criminal legislation that where penalties apply, legislation should be interpreted narrowly and the court should construe any ambiguity in the defendant’s favour. (to give the defendant the benefit of doubt)

** For your exam purpose, a repeat of the definition of the three rules and S.19 is needed in most situations. However, it is advisable that you know the concept better when you need to apply the rules to discuss a case before you. (more common in early day questions)

Supplements: The three Cannon of Interpretation

"The three so-called rules, ie literal, golden and mischief are not rules at all since there is no compulsion 強制, 強迫 to apply them. Moreover, there is no consistency of application when they are applied. There is no set of priority"

* Literal Rule of interpretation is that the intention of words used in a statute must be found in their plain, ordinary or literal .The objective of the court is to discover the intention of Parliament as expressed in the words used.

R v Judge of City of London Court CA 1892
Lord Esher MR - the literal rule
`If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity'

Examples:

Inland Revenue Commissioner v Hinchy HL 1960 AC 784
- S.25(3) of Income Tax Act 1952

`Any person delivering an incorrect tax return should forfeit ... triple the tax which he ought to be charged under this Act'
- Unpaid Tax ?
- Whole amount of tax payable ?

Housing (Homeless Persons) Act 1977
- a person is not homeless if he is occupying `accommodation'
- place lacking in cooking and washing facilities ?
- still accommodation

But R v Maginnis 1987 1 AER 907 HL
- Misuse of Drugs Act 71 : an offence for a person to have a controlled drugs in his possession...with intent to supply it to another..

- D has a package of cannabis 印度大麻, in his car , he said he intend to return the drug to its owner did not amount to intention to supply the drug within the meaning of the statute.

HL held by 4 : 1 found him guilty
- Lord Goff dissenting, refer to word given in Shorter Oxford

`supply was not to describe a transaction in which A handed back to B goods which B had previously left with A' , thus cloakroom 衣帽間, 寄物間 attendant warehouseman 倉庫管理人 and shoe repairer do not supply anything to their customers

* Bribery law in PBO : receive advantage in his official capacity

* use of dictionary does not always help if statute has a definition, eg. equipment in dictionary : something ancillary 補助 to something else, but a ship was held to be within the definition in the Employer Liability (Defective Equipment) Act 1969 as including `any plant and machinery, vehicle, aircraft and clothing'.

* Interpretation Act 1978 (IO in Hong Kong)

- masculine gender 陽性的 include the feminine 女性的 and vice versa

- word in singular include the plural

* It always happen that ambiguity arises through an error in the drafting of statutes whereby words used have two or more literal meanings.

eg. In Fisher v Bell (1961)(This case will come up in the Contract Notes)
The Offensive Weapons Act 1959 make it an offence to `Offer for sale' certain weapons including `flick Knives'. However, in this case a shopkeeper who displayed such weapons in his window was held not guilty because, as every law student of contract knows that the exhibition of goods in a shop window does not constitute an offer.

* Golden Rule (purpose approach): While words in a statute must be interpreted according to their ordinary, natural, grammatical meanings so far as possible but only to the extent that such an interpretation does not produce a manifestly ABSURD result. The golden rule apply where a statute permits 2 or more literal interpretations, the court must adopt that interpretation which produces the least absurd result. It can be used to modify the literal rule in order to avoid absurdity 荒謬, 悖理, If the words used are ambiguous the court should adopt an interpretation which avoids an absurd result.

* Golden rule can only be used where there is a sensible alternative interpretation

Corocraft v Pan American Airways
`the literal meaning of the words is never allowed to prevail where it would produce manifest absurdity or consequences which can never have been intended by the legislature'....Lord Denning.

Examples:

- *Landlord and Tenant Act 1954*
- `No application (to grant a new tenancy) shall be entertained unless it is made not less than two nor more than four months after the tenant's request for a new tenancy'
- Does the court have power to consider for less than 2 month's application?
- HL say yes, court has such power.

R v Allen 1872
- S.57 of the Offence Against the Person Act 1861 provides that:
" whosoever, being married shall MARRY any other person during the life of the former husband or wife shall be guilty of Bigamy 重婚罪"

- A person being married cannot marry! The second Marry must be null and void.

- Also, "Marry" [interj] has archaic 已廢的, 古老的, meaning for emphasis and especially to express amused 好玩的, or surprised agreement.

- As a result this was construed as `going through a ceremony of marriage' to avoid the absurd result.

Federal Steam Navigation Co. Ltd v Department of Trade & Industry (1974)
- The Oil in Navigable Waters Act 1955 provides: "the owner or master of the ship should be punishable in the case of oil discharge"
- The House of Lords held that both owner and master were liable because "or" in effect meant "and". It was a clear rejection of the literal rule in this case by the HL.

<u>Adler v George 1964</u>

- Official Secrets Act 1092 : an offence to obstruct HM Force in the vicinity 鄰近 of a prohibited place
- D obstruct the prohibited place --> guilty ? yes.

* The Mischief Rule(不明確文字釋規程): sometimes known as the rule in Heyden's case 1584 allows the court to look at the state of the former laws in order to discover the mischief in which the present statute was designed to remedy.

Four things are to be discerned and considered:

- What was the common law before the making of the Act,
- What was the mischief and defect for which the common law did not provide,
- What remedy the Parliament have resolved and appointed to cure the disease of the commonwealth, and
- The true reason of the remedy, ---> the job of the Judge is always to make such construction as shall suppress the mischief and advance the remedy

Examples:

<u>Re: Kruhlak 1958</u>
"Single Woman" under the Affiliation Proceedings Act 1957

- for the purpose of affiliation 附屬成員 proceedings (to trace the origin of the child)

"single woman" was interpreted as a woman with no husband to support her, not necessarily an unmarried woman, since the mischief which the Act was passed to remedy is the possibility of a woman having an illegitimate 非婚生子女 child with no means of supporting it.

Corkery v Carpenter 1951

- D was arrested without a warrant for being drunk in charge of a bicycle on the highway
- Licensing Act 1872 S.12 : a person found drunk in charge of a `carriage' on the highway may be arrested without a warrant
- Carriage 馬車 ---> bicycle 單車? Yes !
- The mischief aimed at by the Act was drunken persons on the highway in charge of some form of transport. If the court had applied the literal rule instead of the mischief rule the result might be different.

McMonagle v Westminster City Council 1990

- a criminal offence knowingly to use premises as a `sex encounter establishment' without a licence from the local authority
- definition : performance, services and entertainments which are not unlawful
- The defence was that the activities at his premises (live peep-show which was clearly pornographic 春宮畫的, 黃色文學的) were unlawful so that , on strict interpretation of the statutory provisions, he did not need a licence for them ! - HL said that they were rightly convicted. In order to avoid a manifest absurdity, it was necessary to ignore the words `which are not unlawful. The mischief was the proliferation of uncontrolled sex establishment.

Smith v Hughes [1960] 1 WLR 830

- Two common prostitutes, standing on a balcony 陽台, or behind windows in their house, severally solicited men passing in the street by tapping on the balcony rail 欄

杆, or window pane 方框,, attracting their attention and inviting them into the house. Information were preferred against each prostitute charging that she, being a common prostitute, did solicit in a street for the purpose of prostitution contrary to section 1(1) of the Street Offences Act, 1956. The prostitutes were convicted. On appeal:-
Held: dismissing the appeals, that on the true construction of section 1(1), taking into consideration the mischief at which the Act of 1959 was aimed, it mattered not where a prostitute stood (whether on a balcony, or in a room behind a closed, or open, or half-open window), if her solicitation 誘惑, was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1(1).

Remember again, that the three "rules" are approaches to interpretation of statues, not rules indeed. As from below there are other aids to statutory interpretation as well. Judges give meaning to words all the times but seldom mention what "rules" they use.

Supplement: Context Approach in interpretation of Statutes

* A broad view, read in words necessary implied

Internal Aid to interpret a statute

Short title:
no, merely descriptive

Long title:
yes, may be look at in cases of ambiguity

Preamble:
yes, the need and intended effect of the legislation

Punctuation:
may be where a statute provision is ambiguous, was not used in old statutes

Headings:
not part of the Act/Ordinance, may be used as an aid to construction in cases of ambiguity

Marginal or side notes:
not discussed in Parliament/Legico, may be useful indicators of the general purpose of a section and the mischief at which it is aimed

Schedules:
undoubtedly part of the statute and may be looked at to cast light on any uncertainty thrown up in the main body of the legislation

Examples:
yes, part of the legislation

External Aid

1. dictionary

2. related statute, eg. Securities Ord and Securities and Future Commission Ord and Commodities Trading Ord

3. legislative antecedents, eg Banking Ord of 1948,1964,1986 and the Deposit Taking Company Ord 1976

4. By-laws

5. Treaties and International Conventions

6. Hansard: It is the record of the discussion and debate in the legislature. The general rule is it is not a aid to interpretation, but the rule was relaxed in recent year by:
Pepper v Hart 1993 1 AER 42, the HL took the lead in adopting a more relaxed approach towards its use in cases involving the construction of delegated legislation. Hansard can be used as a way to ascertain the legislative intent if the legislation is ambiguous or obscure, or lead to an absurdity.

7. government publications

Presumptions when interpreting law

1. Presumption against alternation of the common law
The common law also provided presumptions which judges will follow unless they have been explicitly excluded in the statue.
-apply where a statute is capable of two interpretations
eg. an accused's spouse can be called as a witness for the prosecution or the defence, consent of the accused is not required ---> competent =====> compellable ----> no!

2. Presumption against deprivation of liberty

3. Against deprivation of property and interference with private rights

4. mens rea (guilty mind) is required in criminal offence
Sweet v Parsley 1970 -the management of premises used for smoking of cannabis

5. Against retrospective effect (note: ICAC Ord partial amnesty for corruption prior to 1.Nov.1974)

6. Rules of "Natural Justice" apply: equality before the law and fair hearing.

Beware that these are presumptions, not fast rules that a judge must follow, in fact, exceptions are far common than the presumptions

Supplement: Other Rules : Statutes must be read as a whole

noscitur a Sociis
- each section in a statute must be read subject to every other section
expressio unius est exclusio alterius
- the express mention of a person or thing excludes by implication other persons or things not mentioned
eg. Statute of Fraud 1677
- require the contract for the sale of goods, wares and merchandise for $10 or more be evidence in writing, did not apply to a contract for the sale of stocks and shares - excluded by implication.
ejusdem generis (of the same kind)
- general words which follow particular words must be limited to meanings similar to those of the particular words

eg. Betting Act 1853

- keeping of a house, office, room or other places for the purpose of betting with people is prohibited
- a ring, an outdoor place at a racecourse did not fell with the other places

eg. Re Wood 1986

- any gun, pistol, hanger, cutlass, bludgeon or other offensive weapon ---> an accidentally broken piece of glass is not offensive weapon

@ Laws Relevant to the Teaching Profession (optional) p.77

What introduce here under are mainly common law concepts that teachers may come across in their daily life of teaching in main points only.

1. Agency concepts involving school business
2. Vicarious Liabilities of School
3. Employment concepts in school management
4. Professional Negligence with teachers
5. Defamation 陳茂波夫婦 vs 漢基國際學校
6. Contractual relationships with minors
7. Copyright in Education Use

1. Agency concepts

Agency is a necessary commercial device. E.g. as company is a legal person, all its acts are done by agents. Even small business needs agents in order to carry out business, e.g. the shop assistants. The function 功能, of the agent is to act on behalf of his principal to establish a contractual relationship between the principal 委托人 and a third party.

S.9 PBO 《防止賄賂條例》
(代理人的貪污交易)
Agency concept:

Principal 主事人 Agent 代理人 3rd Party 第三者

- 資助學校採購程序
- 學校的商業活動
- 學校及其教職員收受利益和捐贈事宜
- 合約關係

Normally, the Agent makes the contract for the Principal and then drops out of the picture and the rights and obligations in the contract continue with the principal and the third party, the agent has no rights or liabilities under that contract. In law,

however, the relationship is far more complicated.

The principal is jointly 共同 and severally 各自 liable with his agent for any torts committed within the scope of his authority. More often the wrongful act is performed by the agent acting within his apparent 明顯 or ostensible 表面的 authority.

United Bank of Kuwait v Hammond; City Trust v Levy [1988] 1 WLR 105
Two cases : A solicitor acting as a partner in the first case and as an assistant in the second, signed forms of guarantee 擔保 and undertakings 許諾, without actual authority, and resulted in both Banks lending money to fraudulent third parties. Held he Banks were reasonable in believing that the solicitors was acting within the firm's authority. Thus both firms were liable.

Creation of Agency Relationship: The general rule is that the relationship between a principal and the agent is consensual 在兩愿下成立的 in that no one can claim to be another's agent unless under consent. The consent may be expressed or implied.
Q. When creating contracts and making decisions relating to school management, who will be regarded as the principle and who are agents?

Agency can be created by expressed 明示 authority …This type of authority is created by words, either written or oral. No particular form is required unless the agent is required to executed a deed, in which case he must be appointed by a deed, called a Power of Attorney 授權書.

Implied 隱含 or usual 通常的 authority …. this permits the agent to perform all reasonable incidental 附帶的 or subordinate 附屬的 acts necessary in exercise of his given express authority. (protection to 3rd party) Agency by estoppel 不容反悔原則 or ostensible 表面的, 外表的 authority …. If the principal has so acted as from his words or conduct to lead another to believe that he has appointed a person X to act as his agent or that X has authority from the principal and X purports 要領是 to act as the principal's agent, principle will generally be estopped from denying agent's authority though in fact no agency really existed. The agent in this situation is said to have apparent or ostensible authority.

Ratification 追認 of authority … Where A has no authority but purports 意味著 to contract with third on principal's behalf, the principal may later ratify 批准 , the contract and the ratification then relates back to the making of the contract by agent.
Ratification 追認

is the express adoption 采用 by principal of the contract, or conduct showing unequivocally 不含糊的,that he adopts 采納 agent's act. Agency of necessity …Eg. the master of a ship, in times of emergency, may contract for provisions and urgent repairs and bind the owner of the ship to such a contract.

Termination of Agency

The parties to an agency contract may at any time mutually agree to bring it to an end. An agency is normally terminated automatically when :

1. End of fixed period in the contract or if no fixed period, contract terminates after the agent has completed all he has been authorized to do.
2. Death, mental incapacity or bankruptcy of either party. Notice of such event to the other party is immaterial.

- Rights and Duties of Agents
- Rights of Remuneration 報酬
- Right of Indemnity 彌償
- Rights of Lien 留置權
- Duty to obey instructions of his principal
- To exercise duty with care and skill
- Duty not to delegate duty
- Duty to avoid conflicts of interest
- Duty not to make secret profit/ to account
- Duty not to misuse confidential information

討論：虛構案例

某校副校長代表學校將學校基金投資在 AIA，通常是定息債卷。某年副校長在沒有與校董會討論的情況下將，因 AIA 經紀的遊說，將投資轉為雷曼迷債。 頭兩年增長 8%，十 分理想，副校長光榮退休了。第三年金融風暴，基金倒蝕六成。這時校董會發覺從未正式授權副校長轉移投資，於是通知 AIA 認為轉移投資到迷債的合約無效。

2. Vicarious Liabilities with a School 轉承法律責任

The liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them, usually that of employer and employee. Agency - The liability imposed on a principal who employs another person to perform work on the principal’s behalf for tortuous acts performed by the person within the scope of his or her authority.

In the context of vicarious liability, the word ‘agent’ has a wider connotation than

'employee' does: an independent contractor or an employee may be an agent; a person may also be an agent although he is not 'employed' by the principal in a technical sense. A company is liable to be sued for a tort committed by its agent if an action in tort would lie against an individual and the agent is acting in the course of his employment or within the ostensible scope of his authority, and the act complained of is one which the company might possibly be authorized by its constitution to commit.

Employment - The liability of an employer to third persons for the tortuous acts of an employee which the employer actually or impliedly authorizes. The acts must be committed in the course of employment, while the employee is acting within the scope of his or her authority and performing the employment duties, or be acts incidental to the employment duties. In order to render an employer vicariously liable it is necessary to prove that the employee has been guilty of a breach of duty towards the person injured. A tortuous act that is so connected with an act the employee is authorized to perform as to amount to a mode of performing the authorized act, is an act within the course of employment. An employer cannot be vicariously liable for an attempt by his employee, servant or agent to commit a crime even if he may be vicariously liable for the completed crime.

討論: 虛構案例

某學校搞戶外活動時，習慣交由一間專業活動制作公司安排搭建舞台及安裝音響事宜。學校與公司會簽一合約，由公司負責購買保險並會補償(indemnify)學校活動期間舞台及音響不妥善引起的損害賠償。 這公司的幾名僱員亦是學校學生的家長並熱心於家長會的事務。某年開放日，這幾位家長建議找來朋友幫手義務幫搭台並借出音響，節省的金錢用來多購抽獎禮品。結果發生意外舞台塌下引致多名學生受傷。 校長為小心計，事前已請所有活動參加者簽署表格，上有條款寫明校方不會為活動的意外負責賠償。

3. Employment concepts

- Contract of service and contract for service
- Employment Contract

Common Law rights and obligations of employer and employee
Employment Law is governed both by common Law and Statute. There are quite a number of statutes in Hong Kong that are relevant to the employment relationship. The most important one being the Employment Ordinance.
Contract of service 雇佣合約 and
Contract for service 服務合約
Under a contract of service a person places his or her labour 勞力 at the disposal 支配

of another and thus the relationship is that of employer and employee. Contract for service is where a person is "in business on their own account", the relationship is that of the employer at the one hand and an `independent contractor' 獨立合約者 at the other side, not an employee.

The distinction is important as it determines whether various employment laws applied to the contracting party. Eg. unfair dismissal 不公平解僱(not in Hong Kong), union protection, and social security 社會保障 and employment rights such as maternity 婦產休假 leave, long service payment.長期服務金, holidays, annual leave, sickness leave, severance pay. In law of torts, an employer is only vicariously 代理地 liable for acts of employee during employment, not to an independent contractor.
Only employees are entitled to compensation for injuries in the course of his employment under the Employees ' Compensation Ordinance. Consequently employers have to take out insurance for their employees according to the Ordinance.

In the Course of Employment 在僱用期間

We also have to decide whether an employee is in the course of employment otherwise the employer is not liable, i.e. whether the work he done is an act expressly or impliedly authorized by the employer.

Central Insurance v Northern Ireland Road Transport Board 1942 AER 491 HL

- A petrol tanker 油車 driver employed by the defendant lit a cigarette while unloading petrol. An explosion resulted.
- is smoking in course of employment ?
- what the servant was employed to do in this case was to discharge petrol, this was what he was doing, albeit in an unauthorized manner.

Ricketts v Thomas Tilling 1915, 1 KB 646

- a bus conductor 售票員 drove the bus to turn it around, but he had the driver’s consent to do so
-liable vicariously not for the conductor but for the driver's consent

Chaplin v Dunstan 1938

- truck 卡車, 貨車 driver on a long distance trip turned off the main road to get a drink, then collided with a motorcycle.
- going to service/toilet is expected

How to decide whether one is an employee?

1. Control Test :
2. Organization Test
3.Integration Test
4. Multiple-factor Test or the Economic Reality Test

Obligation of Employer at Common Law (Implied Duties)

To Provide Remuneration

- Indemnity 保障, 彌償, any expenses, losses, or liabilities incurred by an employee during his/her employment
- Provide Works
- Safe system of work

Obligation of Employee at Common Law

1. Skills and reasonable competence 能力
2. Duty of Good Faith
3. Obedience 服從
4. Confidentiality 机密性
5. To exercise Reasonable Care and Skill

Termination of Employment

- End of contract / by notice
- Dismissal/ Wrongful ~/Constructive~/ Unfair~/Summary dismissal without notice:

a. Willful disobedience to a lawful and reasonable order;

b. Misconduct in a manner which is inconsistent with the due and faithful discharge if his duties;

c. employee guilty of Fraud or dishonesty;

d. Habitual neglect of employee's duties;

e. Any other common law ground to allow employer to dismiss

4. Tort of Negligence 教師疏忽

(Professional Negligence of Teachers ?)

Elements of Negligence :

1. Duty of care
2. Breach of that duty
3. Subsequent damages

<u>The Neighbour Principle in Duty of Care Donoghue v Stevenson 1932 AC 562</u>

- A friend purchased a bottle of ginger beer for the plaintiff at a cafe. The plaintiff poured some of the contents into a tumbler and drank them, then she poured the remainder and out of the bottle floated a decomposed snail 蝸牛. The plaintiff suffered severe shock and become very ill. She sued the manufacturer in negligence as a consequence.
- Held: There was no contractual duty between the plaintiff and the manufacturer but the manufacturer of an article or of food or medicine or the like was under a legal duty to the ultimate consumer or purchaser to take reasonable care so that the article was free from defect 缺點, to cause injury to health. - Lord Atkin : " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who then in law is my neighbour ? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation 打算, as being so affected when I am directing my mind to the acts or omissions which are called in question."

Professional Negligence

(Negligence with a particular profession, usually higher standard)

<u>Lord Morris in Hedley Byrne v Heller 1964 :</u>

" if someone possessed of a special skill undertakes, quite irrespective 無關 of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise"

<u>Hedley Byrne v Heller & Partners Ltd [1963] 2 AER 575</u>

- H ,advertising agents, booked advertising time for customers E. H
becoming doubtful of the financial position of E. H asked the
banker of E for a report. - Defendant believed E `to be respectably constituted and good for its normal business engagements and that E would not undertake any commitments they were unable to fulfil' . Three months later, another written report responding to a further enquiry as to whether E were trustworthy 可信任的 . [ reply in a letter headed `Confidential. For your private use and without responsibility on the part of this bank or its officials' ...` Respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see']
- H relied on these statements and as a result they lost money when E went into liquidation.

5. Defamation 誹謗定義

向遭誹謗的人以外的人士發布貶損該人言辭的侵權行為，其影響是在整體公眾人士的眼中降低遭誹謗的人的名譽。 (to lower the reputation of the person defamed in the eyes of the public at large)在普通法上，誹謗性的貶損言辭可以口頭的（短暫形式誹謗）(slander) 或若干永久的（永久形式誹謗）(libel)形式存在。在評估是否存有誹謗時，被告人的意圖無關，重要的是被告人的行為的影響。《誹謗條例》(第 21 章)。

Elements of Defamation

(原告人一方須證明)

1. The words must refer to the plaintiff (can be implied)

- Innuendo 含沙射影的話

2. The words must be defamatory

- a matter for the jury

3. Words published, i.e. is made known to any one other than the plaintiff.

? Each repetition of the words is a fresh publication

Defence 辯解

1. Justification 証明正確 or truth, no action if the statement is true in substance or fact, it is sufficient to prove substantial truth, but cannot escape liability by referring report of rumour.

2. Fair comment 公正評論 on a matter of public interest 公眾利益 without malice 懷有惡意的

3. Privilege, i.e. statement in LEGICO, courts, senior officials of the services, duty to report.

4. Apology / amends (not strictly a defence) the defendant publishes an apology at the earliest opportunity and before the commencement of the action, this will go towards mitigation of damages. Defendant has to make a payment into court for that defence to show an absence of malice.

陳茂波夫婦 vs 漢基國際學校

漢基誹謗案上訴 陳茂波夫婦得直 2016 年 12 月 24 日 星期六【明報專訊】發展局長陳茂波及妻子許步明， 5 年前向女兒就讀的漢基國際學校家教會及家長發電郵及會議摘要，指該校校董盧光漢的龍鳳胎子女在考試中作弊和獲包庇，陳氏夫婦其後被裁定誹謗，須向盧氏一家賠償 23 萬元。雙方其後各提上訴，上訴庭昨頒下逾百頁判辭，指原審法官錯誤引導陪審團「惡意誹謗」的定義，裁定陳茂波夫婦上訴得直，案件毋須重審，盧氏須支付原審及上訴訟費。陳茂波及許步明

回應指，獲判勝訴是彰顯公義，希望事件可告一段落。

原審時陪審團裁定陳氏夫婦的 6 份文件全屬誹謗，原審法官認為陳氏為維持學校聲譽和形象才發出該些文件，故裁定其中兩封誹謗電郵「受約制特權」保障免責，其他則屬惡意誹謗。上訴庭判辭指出，原審法官就受約制特權的裁決並沒出錯，因為學術誠信一直為該校核心價值，家教會的會議亦有討論避免作弊等誠信問題，以促進學校的管理和營運，而且家長之間應有權討論涉及學生的事情，故收到電郵的家教會前主席及其他家長等，在本案中有維持學校聲譽和公正處理作弊投訴等共同利益，他們之間的通訊，理應獲受約制特權保障。

不過，上訴庭指「惡意」的法律原則應為被告「明知內容錯誤」仍發出誹謗內容，但原審法官引導陪審團時，錯誤地指以「內容是否真實」作為判定惡意的標準，令陪審團在錯誤基礎上作出錯誤裁決。

上訴庭續指出，許步明當時單靠與學校的電郵來往和自己觀察，便相信女兒所說有同學作弊，雖然推斷輕率和不合理，但認為她是真誠相信有人作弊，而且本意是希望維護學校形象和聲譽，故即使她在電郵中有冒犯字眼，仍享有受約制特權的保障。上訴庭強調，一個獲正確指引的陪審團，並不會得出其他結論，決定毋須重審案件，駁回盧氏一方質疑陳氏夫婦獲受約制特權的上訴。【案件編號： CACV251、 252/15】 43

6. Basic Concepts of A Contract

A Contract is more than an Agreement Formation of Contract 合約的构成

- offer and acceptance/with intention/consideration (be sufficient but need not be adequate/ A Deed Clear Terms/Contract can be made orally /Some contract need to be in writing/ Parol evidence rule/ Express Terms and Implied Terms/ Control of Exemption Clause Ordinance, Cap 71.

Contract with Minors

Capacity to make Contracts 履約能力…

Not all contracting parties can make contract, the precondition in law is that they must have the capacity to make a contract. Minors, mentally ill people and drunken people do not in law have the capacity to enter into a legal contractual relationship.

Minors 未成年人 The general rule at common law is that a contract made by a minor was voidable 可使無效的 at his option. In common law, person under are minors, but is now by statute 18 both in Hong Kong and UK.

Contracts with minors are voidable, not strictly void. Voidable means the contract is valid and binding upon him unless the minor expressly disclaims the contract during minority or within a reasonable time of attaining his majority. Contracts can be binding upon the minor if ratified by him when he reached 21 years of age. This principle of law is aim at protection of the minor, not to assist him to obtain unjust benefit. "A shield 盾, not a sword 劍"

<u>Valentine v Canali (1889) 24 QBD 166</u>

A minor took a lease of a house and agreed to pay the landlord 102 pounds for the furniture. He paid pounds and gave a promissory note for the balance. After some month's use of the house and furniture, he took proceedings to get the lease set aside and to recover the money which he had paid.

Held, the lease should be cancelled and the promissory note delivered up, but an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. This case has also been interpreted to mean that the money is only recoverable where there has been a total failure of consideration.

Valid Minor Contract

There are some exceptions as while a contract is for the benefit of the minor.

eg. contract for service, apprenticeship, or that the contract is for purchase of necessary goods.

<u>Edwards v Carter [1893] AC 360</u>

A minor became a party to a marriage settlement under which he took considerable benefits. He covenanted to bring into the settlement any property which might come to him under his father‘s will . One month later he came of age and nearly four years after his father died leaving him property by will, more than a year after his father's death he purported to repudiate the settlement.

Held, by the HL that a contract of this nature was binding unless repudiated within a reasonable time of attainment of majority. He was too late.

<u>Roberts v Gray [1913] 1 KB 520</u>

- The defendant, a minor, entered into a contract by which he agreed to join the plaintiff, a famous billiard player, in a world tour as `professional billiardists'
- The plaintiff incurred certain necessary expenses as a result of preparations for the tour, but before the tour began, the defendant repudiated the contract.

Held, by the CA that to play in company with a noted billiard player like the plaintiff was instruction of the most valuable kind for a minor who wished to make billiard playing his occupation, and they upheld an award of 1,500 damages for the breach.

Illegal Contracts 違法無效的合約

1. Gambling contracts
2. Agreements to commit a crime or civil wrong or to

perpetrate a fraud 欺詐, eg. Contract to beat a man.
3. Contract affecting public service
4. Contract of Maintenance and Champerty 幫助訴訟
5. Publication of libel materials 誹謗
6. Injure the state in its relationship with other states.
7. Agreement perverting the course of justice, or contract to oust the jurisdiction of the court. 破坏司法公正
8. Agreement contrary to good morals, ie directly or indirectly promotes sexual immorality.
9. Agreements affecting the freedom or security of Marriage.
10. Contracts in Restrain of Trade

討論：

什麼情況下學生合約會有效?

學生向學校貸款購買筆記簿電腦。

(necessity or not?)

學校與 Apple I Mac 合作賣新電腦給學生，但學生取去電腦使用後月尾無法付款。

學校能否取回電腦及追討欠款差額？

7. Copyright in Education Use

Copyright 版權概念

The exclusive right to reproduce or authorise others to reproduce artistic, dramatic, literary, or musical works. It also extends to sound recordings, films, broadcasts or cable programs (a computer program) and the typographical arrangement of published editions: Copyright Ordinance (Cap 528) s 2(1).

It protects the way in which an idea or information is expressed in a material form 表達意念或資料的實質形式 (the layout) and not the underlying idea.

No registration is required. It is an intangible property right conferred by the Copyright Ordinance.

7. Copyright in Education Use

S.17 文學作品、戲劇作品、音樂作品或藝術作品的版權期限 …有關作者於某公曆年死亡，版權在自該年年終起計的 50 年期間 完結時屆滿。某公曆年首次製作，其版權自該年年終起計的 50 年期間完結時屆滿;或… 某公曆年首次向公眾提供,其版權在自該年年終起計的 50 年期間 完結時屆滿 ….人士中最後死亡的人的死亡在某公曆年發生,版權在自該 年年終起計的 50 年期間完結時屆滿–(導演、對白的作者、影片中的音樂的創作人) Note … copier’s property right, not the author’s moral right。(著作權)

Defenses 免責辯護

作出合理查究 made reasonable enquiries 並非該 作品的侵犯版權複製品。Reasonable grounds/no other circumstances led him reasonably to suspect /an infringing copy

Permitted works (s.37) …. Research and private study/ a librarian /not multiple copies/

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批評、評論及新聞報導/為立法會程序的目的而作出任何事情作品附帶地包括在藝術作品、聲音紀錄、 影片、廣播或有線傳播節目內閱讀殘障人士 (指明團體 …教育機構 …屬慈善性質)

S.41A 為教學或接受教學的目的而作的公平處理 Fair dealing for purposes of giving or receiving instruction

S.41 為教學或考試的目的而作出的事情 Things done for
purposes of instruction or examination

S.42 供教育用途的選集(在教育機構中使用/主要是由沒有版權存在的材料構成的/有足夠的確認聲明的) (on reserve?)

S.43 在教育機構的活動過程中表演、播放或放映作品

S.44 由教育機構製作廣播及有線傳播節目的紀錄

S.45 教育機構或學生將已發表作品中的片段藉翻印複製

討論：

學校忽然收到無線電視的律師信，指學校在家長會聚餐的集會當中播放了無線電視的 XXX 檔案節目中一段三分鐘講述不良學生管教問題的影片，侵犯了 TVB 的版權，學校當如何應付？